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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

THE HONORABLE ALCEE L. HASTINGS,
UNITED STATES DISTRICT JUDGE,

Petitioner,

v.

UNITED STATES OF AMERICA,

THE HONORABLE EDWARD THAXTER GIGNOUX,
UNITED STATES DISTRICT JUDGE,

and

THE HONORABLE WILLIAM FRENCH SMITH,
ATTORNEY GENERAL OF THE UNITED STATES,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Does the Constitution require that resignation or impeachment and removal by the Congress precede the exercise of discretion by the Executive to prosecute a federal judge on charges that the acts by which he has exercised the judicial power constituted 'high Crimes'?

2. Can the existence of discretion in the Executive to prosecute, and thereby compel the Judiciary to try, a *sitting* federal judge on charges that his acts in exercising the judicial power violated the criminal laws be reconciled with the Constitution's grant of good behavior tenure to members of the Judiciary and its assignment of the sole powers of impeachment and removal to the Congress or with the doctrines developed to keep separate the powers of government and to guarantee the independence and impartiality of every federal judge?

3. Did the courts below err in exercising criminal jurisdiction to determine whether a *sitting* federal judge's official acts constituted serious crimes where the effect of that exercise was not only to pre-empt the constitutionally prescribed impeachment forum and to by-pass the procedures Congress has established for screening such charges in the judicial councils, but also to cast the presiding judges in the role of unnecessarily deciding issues that will substantially affect their own interests as judicial office holders?[1]

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[1] The caption lists all parties to the proceedings in the court of appeals. Petitioner notes here, as he did in the courts below, that all federal judges have interests that will be substantially affected by the disposition of the questions presented here and by the disposition of questions still pending before the district court.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

United States District Judge Alcee L. Hastings petitions this Court to issue a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit to review the judgment that court entered against him.

OPINIONS BELOW

On February 17, 1982, the district court delivered an oral opinion and entered an order denying petitioner's motion to quash the indictment and dismiss the proceedings (App. B, *infra*, 12a - 15a). That court subsequently issued a memorandum opinion further explaining its decision. (App. B, *infra*, 16a - 19a). Those decisions have not been reported. The court of appeals affirmed the district court's decision and dismissed petitioner's application for writs of mandamus and prohibition (App. A, *infra*, 1a - 11a). That decision is reported, *United States v. Hastings*, 681 F.2d 706 (11th Cir. 1982).

JURISDICTIONAL STATEMENT

This petition seeks review of a judgment of the United States Court of Appeals for the Eleventh Circuit entered on July 12, 1982 (App. C, *infra*, 20a). On September 22, 1982, that court entered an order denying petitioner's petition for rehearing and rehearing *en banc* (App. C, *infra*, 22a). The present petition was filed with this Court within sixty days of that date.

The Court of Appeals had jurisdiction under 28 U.S.C. § § 1291 and 1651 (1976) and under the collateral order doctrine expressed in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949); *Abney v. United States*, 431 U.S. 651 (1977); and *Helstoski v. Meanor*, 442 U.S. 500 (1979). *See also Nixon v. Fitzgerald*, _____ U.S. _____, _____, 102 S.Ct. 2690, 2697-98 (1982). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1) (1976).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner's claims are based upon the provisions of the United States Constitution governing the tenure and removal of federal judges. U.S. Const., art. III, §1; art. I, §2, cl. 5, and §3, cl. 6 and cl. 7; and art. II, §4. In order to resolve the questions presented, the Court will also have to construe provisions of the Constitution intended to allocate and keep separate the powers of the three branches of government. U.S. Const., art. I, §1; art. II, §1, cl. 1, §2, cl. 1 and cl. 2, and §3; and art. III, §1 and §2, cl. 1 and cl. 3. A determination of the proper interpretation of these constitutional provisions will require consideration of the purpose and function of the Judicial Council Reform and Judicial Conduct and Disability Act of 1980, Pub. L. 96-458, 94 Stat. 2035 (1980), *as codified at* 28 U.S.C. §372(c) (Supp. IV 1981), and of the provisions governing the disqualification of federal judges, 28 U.S.C. §455(a) and (b)(4) (1976 & Supp. IV 1981). Because of their length, the provisions involved have been included in an appendix to this petition (App. E, *infra*, 31a - 40a).

STATEMENT OF THE CASE

The United States indicted a federal judge in active service. The indictment charged that the acts by which the judge formulated a judicial decision constituted crimes under the laws of the United States. The accused judge moved to quash the indictment and dismiss the proceedings. He claimed that, unless and until the Legislative Branch exercised its constitutional prerogative to impeach and remove him, the Constitution and the separation of powers

doctrines barred the Executive Branch from prosecuting him for the manner in which he exercised the judicial power. He also claimed that the same principles coupled with those codified in 28 U.S.C. §455 barred the district court from assuming criminal jurisdiction to determine whether his judicial conduct constituted crimes under the laws of the United States. The district court denied the motion. The court of appeals affirmed. This petition asks this Court to review the court of appeals's judgment and resolve the fundamental constitutional questions presented.

Facts

The Honorable Alcee L. Hastings is one of five hundred United States District Judges. He was appointed in 1979 and actively served as a judge of the United States District Court for the Southern District of Florida until the Executive Branch initiated these proceedings.[2]

On October 6, 1981, Judge Hastings issued a final order in *United States v. Romano*, No. 78-364-Cr-ALH (S.D. Fla. Oct. 6, 1981) [hereinafter "the Romano Order"]. In May, Judge Hastings had entered a judgment of forfeiture against the defendant Romano brothers, upholding the government's claim that certain fruits and profits derived from racketeering activity were included in property forfeit under a federal statute commonly known as the RICO Act. The Romanos filed timely motions for reconsideration. While those motions were pending, the court of appeals for the circuit adopted an interpretation of the RICO Act that Judge Hastings had rejected in his original judgment. In the

[2]Judge Hastings voluntarily requested reassignment of pending matters when the government publicly announced the allegations against him.

Romano Order, Judge Hastings concluded he was bound to follow the law of the circuit. He modified his original judgment, restoring a portion of the property initially declared forfeit. *United States v. Romano*, 523 F. Supp. 1209 (S.D. Fla. 1981).[3]

On October 9th, a Justice Department attorney sent federal agents to Judge Hastings's chambers. The attorney instructed them to interview the judge's law clerks and staff concerning the issuance of the Romano Order and to serve a grand jury subpoena. The subpoena was addressed to the "Secretary, Chambers of the Honorable Alcee L. Hastings, United States Courthouse," and called for "the *official* records of the Honorable Alcee L. Hastings, Judge, United States District Court for the Southern District of Florida" [emphasis in original] including the judge's "Appointment diaries, daily schedules, . . . telephone message books, logs, and memoranda." Neither the judge nor his secretary was present. The agents interviewed the judge's clerks and staff in the judge's chambers and obtained the documents they sought from the judge's private office.[4] (R. 278, 356-60.)

On December 29, 1981, attorneys for the United States filed the indictment that initiated these proceedings. According to the indictment, the Justice Department had employed an undercover agent to pose as one of the Romanos. The undercover agent negotiated only with

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[3] *Appeal docketed*, No. 81-6139 (11th Cir., Nov. 14, 1981); *application for writ of mandamus filed, sub nom. In re United States of America*, No. 82-5114 (11th Cir., Jan. 18, 1982) (challenging trial court jurisdiction) (cases consolidated for hearing only, Feb. 1, 1982).

[4] This summary is based upon the description of the events set forth by the *government* in its opposition to the judge's motion to suppress the evidence seized from his chambers and inner office. The law clerks were subsequently called before the grand jury (*see* R. 214).

William Borders, a Washington attorney.[5] The indictment alleged that Borders and the agent agreed that the agent would pay Borders $150,000 in exchange for Judge Hastings issuing an order returning a substantial portion of the forfeited property and a promise that Judge Hastings would grant a subsequent re-sentencing motion. (App. D, *infra*, 23a -28a.)

The indictment charged that Judge Hastings had committed two crimes. Count I charged that Judge Hastings had conspired and agreed to permit Borders to solicit and receive a bribe from the Romanos in exchange for his "being influenced in his performance of official acts as a United States District Judge" and identified his issuance of the Romano Order as an overt act in furtherance of that conspiracy. Count II charged that Judge Hastings had disclosed to Borders the substance of, and the time when he would issue, the Romano Order and thereafter had issued the Romano Order "wherein the content and timing were consistent" with the prior disclosure, intending thereby to obstruct justice. (*Id.*)

To remove any doubt about the scope of the challenged conduct, the prosecuting attorneys represented to the trial court:

> [Counsel for the Government]: . . . .
>
> [W]e do recognize there's a possibility of some confusion or some inability to defend without a specific statement and representation by the Government that the conspiracy conceives only of the Romano case. When there's a representation made in these paragraphs [5 through 8] that there were criminal defendants, we speak of the Romano brothers, and when we speak of acts of Judge Hastings, we speak of official acts in the Romano case. . . . [F]or purposes of the indictment, we do make those specific representations.

---

[5]Mr. Borders was also indicted. He was tried separately and convicted (*see* App. A, *infra*, 3a n.3).

THE COURT: And that is made of record at this time.

[Counsel]: Yes.

THE COURT: Would the Reporter mark his notes so that this may be recaptured.

(R. vol. 5, 191-92.)

Proceedings Below

The accused judge filed a timely motion to dismiss (R. 52-54, 231-62). Although the trial judge acknowledged that the motion presented substantial constitutional questions that could only be finally resolved by this Court, he denied the motion (App. B, *infra*, 12a -15a). The accused judge appealed to the United States Court of Appeals for the Eleventh Circuit and subsequently filed an application seeking writs of mandamus and prohibition directed to the trial judge and the Attorney General. That court affirmed the decision below and dismissed the application for writs (App. A, *infra*, 1a - 11a).

REASONS FOR GRANTING REVIEW

1. The constitutional questions are fundamental. The Honorable Alcee L. Hastings is a federal judge. Pursuant to Articles I, II, and III of the Constitution, he is entitled to hold office and exercise the judicial power of the United States unless and until he resigns or has been impeached by the House of Representatives and tried and convicted by the Senate of "Treason, Bribery, or other high Crimes and Misdemeanors." U.S. Const. art. I, §2, cl. 5, and §3, cl.6; art. II, §4; and art. III, §§1 and 2. The framers designed these provisions to protect members of the Judiciary from coercion or interference by the Executive. They concluded that impeachment and removal by Congress was the only

remedy for judicial misconduct "consistent with the necessary independence of a judicial character." *The Federalist*, No. 79 (Hamilton) 513-14 (Mod. Lib. ed. 1937).

The framers' understanding was shared by all three branches of government, here and in England. The Crown has *never* prosecuted a judge holding good behavior tenure prior to removal or resignation. That constitutional tradition is 282 years old. Act of Settlement, 1700, 12 & 13 Will. 3, ch. 2 & 3. For the first one hundred fifty years of this nation's history, the Executive *never attempted* to prosecute an Article III judge; charges of serious judicial misconduct were *invariably* referred to the House of Representatives. *See* J. Borkin, *The Corrupt Judge* (1962) (for a summary). Largely for that reason, this Court has never been required to act. Petitioner is the first Article III judge in our nation's history who has chosen to remain in office *and* properly challenge the power of the Executive to indict and the Judiciary to try him on allegations that he committed impeachable offenses in exercising the judicial power.

Against this background, the constitutional issues presented are fundamental in the most literal sense of the word. They represent issues that go to the heart of our structure of government. Their resolution requires definition of the powers of each of the three branches of government, definition that must expand or contract the powers of at least one and perhaps two of those branches. This is one of those rare cases that presents issues of first impression whose resolution will have a far-reaching and long-lasting affect on how the three branches of government behave. But the need for resolution of these questions by this Court has been enhanced because Congress and the Executive have recently taken actions which make conflict inevitable unless this Court acts.

Congress construed its powers when it enacted the Judicial Council Reform and Judicial Conduct and Disability Act of

1980, Pub. L. No. 96-458, 94 Stat. 2035, 28 U.S.C. §372 (Supp. IV 1981). By that Act, Congress delegated substantial administrative and disciplinary powers to the Judiciary. But Congress also reasserted that impeachment and removal were its sole prerogatives. Congress expressly mandated that a circuit judicial council and even the Judicial Conference of the United States shall "in no circumstances. . .order removal from office of any judge appointed to hold office during a good behavior. . . .," *codified at* 28 U.S.C. §372(c) (Supp. IV 1981). Congress declared that the power delegated to the Judiciary did not include the power "to prejudge an impeachable offense, a determination that under the Constitution can only be made by the Legislative Branch."[6]

The Executive has asserted here that, prior to his resignation or removal from judicial office, it has the power to indict a federal judge on allegations that the judge committed high crimes in the exercise of the judicial function. The Executive has acted to ensure those powers will be fully exercised against all judges. If the Executive is correct, then the Judiciary has the power to exercise criminal jurisdiction to determine whether a federal judge has committed an impeachable offense. These powers conflict with the construction Congress has given its own powers. Resolution of that conflict is necessary, not only to determine the conditions necessary for an independent judiciary, but also to avoid a conflict within the Judiciary—a conflict between the judicial council's administrative jurisdiction and the district court's criminal jurisdiction.

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[6]S. Rep. No. 362, 96th Cong., 2d Sess. 6 (1980, *reprinted in* 1980 U.S. Code Cong. & Ad. News 4315. *See also* H.R. Rep. No. 1313, 96th Cong., 2d Sess. 17-19 (1980). The House bill was substituted for the Senate version in conference. *See* discussion, *infra,* 16-17.

2. The Executive's actions threaten irreparable harm to the Judiciary. The Executive has now asserted that the Attorney General, the United States Attorneys, and their subordinates have a discretionary power of prosecution that can be exercised against federal judges for the very conduct by which those judges exercise the judicial power in cases to which the Executive is a party. The Executive claims that this power necessarily embraces the power to employ "informant[s], undercover operatives, wire intercepts, electronic surveillance and grand jury process" to investigate judicial conduct it finds suspect.[7] The Justice Department has acknowledged that, in the first five years of its existence (1976-1980), the Criminal Division's Public Integrity Section exercised some or all of these claimed powers to investigate alleged criminal conduct by twenty-five federal judges and that, in the year preceding that acknowledgement, it had exercised discretion in declining to prosecute in four instances.[8]

The information that is not known and cannot be discovered is perhaps more important. We do not know how many federal judges the Public Integrity Section has investigated since 1980, or how many have been formally or informally investigated by local United States Attorneys or other federal agencies. The Executive has not reported whether any of these judges have been made aware of the investigations or their results, or if any have been informed of the bases upon which prosecutorial discretion was exercised

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[7]Brief for Appellee United States of America, at 42-43, *United States v. Hastings, supra.*

[8]*Judicial Tenure and Discipline—1979-80: Hearings Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary,* 96th Cong., 1st and 2d Sess. (Comm. Print. 1980) [hereinafter "Hearings"], 160 and 160 n.4 (Statement of Maurice Rosenberg, Assistant Attorney General).

in their favor. We do not know and cannot know how many citizens now seek to vindicate their constitutional rights before judges who have been made aware that 'there but for the grace of the prosecutor go I'.

There are five hundred United States District Judges in active service. They occupy the front-lines of the federal judicial system. Almost fifty percent of the cases coming before them involve disputes to which the Executive is a party.[9] Daily, these judges must deal with Justice Department attorneys and Assistant United States Attorneys employed to assert the Executive's interests and, on the criminal side, to exercise its powers. Daily, these judges are called upon to accept or reject the work of these attorneys and of the Executive's investigative agencies in controversies affecting the most fundamental rights of the people — the other parties to those actions. Friction is inevitable. This Court should grant review to determine the extent to which these judges may properly be subjected to the investigative and prosecutorial powers held by the attorneys who represent the Executive before their courts.

3. This case and the context in which it arose present the basic constitutional questions in their narrowest form and illustrate the fundamental concerns that require this Court's review. First, the case itself: As the Executive concedes, it has asserted its claimed powers to their outer limits. Acting on an informant's tip, the Justice Department employed an undercover agent to pose as a defendant. The agent dealt solely with an alleged attorney co-conspirator, never with the accused judge. The indictment charged the judge with the inchoate offense of conspiracy and with obstruction of justice based upon an alleged premature disclosure of a

[9] *See Annual Report of the Director of the Administrative Office of the United States Courts (1981),* 125-128, 197-207, 251-269.

judicial order. The Executive's attorneys represented to the trial court that the indictment was based solely on the judge's official acts in the *Romano* case. The investigation, the indictment, and the Executive's representations make it clear that neither charge can be proven unless the Romano Order itself and evidence showing the manner in which it was formulated and discussed are admitted at trial and submitted to the jury.

The Executive has asserted that its prosecutorial powers necessarily require that it be able to reach into the heart of a judge's chambers, using electronic surveillance and the powers of the Grand Jury to probe the minds of a judge's official staff and examine a judge's private records and communications to determine whether that judge committed a crime in the exercise of the judicial power. In effect, the Executive here denies that the Constitution even *stays* its discretion to prosecute a federal judge pending impeachment in circumstances in which it must concede the Constitution would absolutely *prohibit* the exercise of that discretion against a legislator. *See United States v. Brewster,* 408 U.S. 501 (1972) (Speech or Debate Clause immunizes members of Congress from charges requiring evidence of their official acts in exercising the legislative power).

Second, the context: The fact that it was Judge Hastings who was charged and that it was his decision in *Romano* that formed the basis for those charges illustrates not only the breadth of the discretionary powers the Executive claims, but also the potential for their abuse. Judge Hastings is a controversial judge. He was the first black appointed to the bench in the Southern District of Florida. He was appointed by a Democratic President. In his first three years in office, he demonstrated an independence and a perception of the

law that ran counter to positions the Executive had vigorously asserted.[10]

In the courts below Judge Hastings chose to defend his office on constitutional principle. For that reason, his motion did not seek and could not have sought an evidentiary hearing to determine whether the Executive had in fact abused its discretion. But the facts reported are matters of public record and illustrate the potential for abuse inherent in the unfettered discretion the Executive claims and has exercised in this case. The Executive did in fact choose to exercise its discretion against a controversial judge. It chose as the vehicle for that exercise a case to which it was a party and in which it had suffered an unfavorable decision. By that exercise, the Executive was in fact able to precipitate the immediate reassignment of what it perceived as a major immigration case from a judge who had already made clear his disposition to rule against it. *See Louis v. Meissner,* 530 F. Supp. 924 (S.D. Fla. 1981) (preliminary injunction restricting Executive's right to conduct exclusion proceedings for Haitian nationals on whose behalf suit was brought).

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[10]*See* Press, *The Judge and His Friend,* Newsweek, Oct. 26, 1981, at 75, and Pike, *Was This Judge's Courtroom for Sale?,* Nat'l L. J., Oct. 26, 1981, at 1, col. 2 and 3. For example, the judge first ruled against the Executive's immigration policy for the Haitians in *National Council of Churches of Christ v. Egan,* No. 79-2959-Civ-ALH (S.D. Fla. Jan. 10, 1980) (modifying and extending a preliminary injunction and denying the government's motions for summary judgment and dissolution of an existing injunction). The Justice Department chose to initiate its investigation against Judge Hastings after he had been assigned a second case in which Haitian refugees sought to block the Executive's attempt to solve the Haitian problem through summary exclusion proceedings. *Louis v. Meissner,* No. 81-1260-Civ-ALH (S.D. Fla. *filed* June 10, 1981). The Associate Attorney General responsible for the division through which that investigation was conducted was also the Associate Attorney General responsible for directing the administration's immigration policy. *See The United States Government Manual 1982/83,* 319, 321, 810.

4. This case may provide the only meaningful opportunity this Court will have to address these questions. The establishment of a Public Integrity Section in the Department of Justice and its actions to date suggest that judicial prosecutions will occur more frequently in the future if this Court permits the court of appeals's decision to stand. However, the four judicial prosecutions that have occurred and an analysis of the problems the threat of criminal prosecution poses for a federal judge suggest that years may pass before another judge pursues the constitutional challenge to this Court.

The Executive has prosecuted only two persons who were judges at the time of their indictment[11] and only two others who had been federal judges.[12] None of the four chose to

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[11]Circuit Judge J. Warren Davis had retired in 1939 in the face of mounting evidence of judicial misconduct. He retained the benefits to which a retired judge was then entitled. The Executive indicted and twice prosecuted him in 1941. Both cases were tried by a jury; neither produced a verdict. The indictment was dismissed. Davis then resigned completely to avoid impeachment. J. Borkin, *The Corrupt Judge*, 95-137 (1962).

Otto Kerner was the first and is the only federal judge to be indicted, tried, and convicted while he was a judge in active service. But the charges against Judge Kerner stemmed from his pre-judicial conduct as Governor of Illinois. In addition, Judge Kerner did not challenge the indictment or prosecution before trial; he elected to take his chances with a jury and lost. Only after his conviction did he urge that his conviction was invalid because the Constitution required impeachment before trial. Two circuit judges on the special panel assigned to hear Kerner's appeal concluded he had not waived this claim and went on to opine that the Constitution did not require impeachment before trial. The third concurred in the judgment, but only on the ground that Kerner had waived the claim by failure to assert it before trial. This Court declined to review that decision. *United States v. Isaacs*, 493 F.2d 1124 (Special Panel), *cert. denied*, 417 U.S. 976 (1974).

[12]Two other judges have been indicted after they had resigned from office to avoid impeachment: Circuit Judge Marvin Manton and District

(continued)

remain in office *and* challenge the Executive's authority. All sought the protections accorded them as individual defendants in a criminal trial rather than risk the impeachment process. The judge accused here is the first judge to hold his office and properly assert the constitutional challenge to the Executive's authority in order that this Court might have the opportunity to consider and resolve these questions.

Any judge threatened must be concerned with the costs of a constitutional challenge and with the costs and risks of impeachment proceedings. The precedent established by the court of appeals's decision here [and its interpretation of *United States v. Isaacs*, 493 F.2d 1124 (Special Panel), *cert. denied*, 417 U.S. 976 (1974) and this Court's recent *dicta* as precedent] would diminish the prospect for a successful constitutional challenge. The fact of that precedent, coupled with the other costs and risks, might well lead any future judge to consider bargaining a resignation or retirement in exchange for a favorable exercise of Executive discretion. The weak, the vulnerable, or the corrupt judge might be influenced to exercise judicial discretion in favor of the Executive, hoping to induce a favorable exercise of prosecutorial discretion by the Executive in return. Every judge must recognize that his or her rights as an individual can be protected better in the judicial system, with the

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(footnote continued from preceding page)

Judge Albert Johnson. Borkin, 28-32, 138-181 (1962). Judge Johnson was acquitted; Manton was convicted. *(Id.)* Manton argued that he was absolutely immune from prosecution for his official acts as a judge. The court of appeals rejected that contention and this Court declined review. *United States v. Manton*, 107 F.2d 834 (2d Cir. 1939), *cert. denied*, 309 U.S. 664 (1940). That question, of course, is not presented here. Judge Hastings has never claimed immunity; he claims only that the Constitution defines the correct sequence of remedies for judicial misconduct.

special procedural rights accorded a criminal defendant and the requirement that the Executive persuade a jury that guilt has been established beyond all reasonable doubt, than they can in impeachment proceedings. None of these 'judicial' decisions will be reviewable.

If the Executive has, in fact, the discretion it has here exercised against Judge Hastings, it has and may exercise that same discretion with respect to any federal judge. The Executive's actions since 1976 make it clear that the threat that substantial and increasing numbers of cases to which the United States is a party are being presided over by investigated but unindicted federal judges is real. This Court should not permit that to continue without first deciding whether the Constitution permits it. This may be the only opportunity this Court will have to address the questions presented before the damage to the Judiciary and its credibility are beyond repair.

5. The powers the Executive has exercised here also conflict with the construction Congress gave its own powers in 1980 and have placed the Judiciary in a dilemma. Congress has authorized the Judiciary to address problems of judicial behavior through the administrative powers vested in the circuit judicial councils but has prohibited the Judiciary from conducting public adversary proceedings to predetermine whether an impeachable offense has occurred.[13] The Executive has acted here to compel the district

[13]In adopting the 1980 Act, Congress construed its own impeachment prerogative as exclusive. It concluded that both constitutional principle and contemporary policy precluded delegation of the power to remove or to prejudge an impeachable offense to the Judiciary. Congress concluded that the powers it had delegated to the judicial councils "—combined with increased vigilance on the part of Congress for possible impeachment of a Federal Judicial officer — affords the public adequate protection from the occasional corrupt judge without creating open season on judicial

(continued)

court to exercise the judicial power in a public and adversarial proceeding to adjudicate whether an impeachable offense has occurred. The two positions conflict. The Court should act, not only to resolve the conflict between the Executive and the Legislative Branches, but also to determine what roles the Judiciary may properly perform and how those roles should be performed. None of the three branches of government can function correctly until this Court has made those determinations.

When it acted, Congress was fully aware of the Executive's claim that criminal prosecution provided a more effective and efficient method of dealing with charges of judicial corruption. Before the Congress and in the courts below the Executive frankly conceded that the powers it has asserted are inconsistent with a construction that Congress's impeachment powers provide the primary remedy for judicial corruption. It not only urged that criminal prosecution and judicial trial are constitutionally permissible mechanisms for addressing charges of judicial corruption, it also argued that they should be recognized as the preferred means for addressing these problems.[14]

(footnote continued from preceding page)

officers." In so doing, Congress expressly rejected proposals to create a court of judicial conduct in which "sincere or malevolent party litigants and their enthusiastic attorneys" might prosecute "complaints against federal judges . . .[in] a formal adversary accusatorial proceeding" because such a proposal "raised the dangers of a substantial chilling effect on judicial independence. . . ." H.R. Rep. No. 1313, 96th Cong., 2d Sess. 17-19 (1980). Accordingly, Congress mandated ". . .that . . . in no circumstances may the [circuit judicial] council [or the Judicial Conference] order removal from office of any judge appointed to hold office during good behavior. . . ," 28 U.S.C. §372(c)(6)(B)(vii) and (8)(Supp. IV 1981), and that all matters before the councils be treated confidentially, 28 U.S.C. §372(c)(14)(Supp. IV 1981).

[14]*See* Brief for Appellee United States of America, *supra* note 7, 42-47; *see also Hearings, supra* note 8, 159-68 (Statement of Maurice Rosenberg, Ass't. Atty. Gen.), 141 (Remarks of Rep. McClory), and 143 (Remarks of Rep. Kastenmeier).

The Executive also frankly acknowledged the consequences that flow from its position. The Executive urged that the investigative resources and expertise of the Justice Department combined with the daily participation of its attorneys in the federal courts make it the agency best able to ferret out judicial corruption.[15] Under this view, the decision whether to initiate criminal proceedings or to refer charges to the appropriate circuit judicial council or to the House of Representatives is, in the first instance, a matter primarily committed to Executive discretion, and by assigning a role in the screening process to the judicial councils, Congress merely created an additional option for the Executive.

The Executive also freely conceded that the powers it claims here will return the impeachment powers of Congress to the residual status those powers had in England prior to the Act of Settlement, 1700, 12 & 13 Will.3, ch. 2. & 3. They will again become residual powers, primarily useful for terminating the benefits of a convicted judge and occasionally useful for removing a corrupt judge when the Executive is unwilling to act or for removing an acquitted judge if an Executive prosecution fails.

If the Executive is correct, Congress need not exercise "increased vigilance . . . for possible impeachment of a Federal Judicial officer", and the circuit judicial councils should take care to assure that they do not act in administrative proceedings to undermine the rights of an accused judge to be tried judicially like any other individual. If the Executive is wrong, it should be told that the products of its vigilance must be reported to the House of Representatives (or to a judicial council) so that the discretion may be initially exercised by the neutral branch.

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[15] *Ibid.*

The Congress has assigned and the Judiciary has exercised substantial administrative powers to increase judicial efficiency and accountability. *See Chandler v. Judicial Council of the Tenth Circuit of the United States,* 398 U.S. 74, 96-102 and 109-10 (1970) (Harlan, J., concurring) and *DuPlantier v. United States,* 606 F.2d 654 (5th Cir. 1979) (for descriptions of these powers prior to adoption of the 1980 Act). The price for these improvements has been a substantial diminution in the independence of the individual judge. *See, e.g.,* Kaufman, *Chilling Judicial Independence,* 88 Yale L.J. 681 (1979). The 1980 Act added to these powers, but attempted to do so in a way that preserved the delicate "balance between the need for judicial independence and the need for judicial accountability."

This Court should now decide whether the powers the Executive claims here are consistent with the delicate balance judicial independence requires. The five hundred district judges, who must daily resolve conflicts between the Executive and the people and who are the primary object of the existing regulatory mechanisms; the circuit judicial councils and conferences, which must strive to exercise the administrative powers while preserving judicial collegiality; and the people, whose right to an independent and impartial judge is in question — all require resolution of the questions presented which only this Court can provide.

6. The decision below conflicts with principles this Court has consistently held necessary to maintain an independent Judiciary. The Executive and the court of appeals relied upon *Isaacs, supra,* and four scattered *dicta* in this Court's opinions for authority.[16] But neither *Isaacs* nor the *dicta*

[16]Prior to 1970, this Court's *dicta* seemingly prohibited criminal prosecution of a federal judge. *See Randall v. Brigham,* 74 U.S. (7 Wall.) 523, 537 (1869) (impeachment only remedy for faithless, corrupt, or dishonest judge); *Bradley v. Fisher,* 80 U.S. (13 Wall.) 335, 354 (1871) *(continued)*

address the questions presented here, and the court of appeals's decision here conflicts with fundamental principles which this Court has regularly held necessary to judicial independence.

In the month preceding that decision, this Court twice reiterated the history, the function, and the importance of the doctrine of judicial independence. *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, ____ U.S. ____, 102 S.Ct. 2858 (June 28, 1982), and *Nixon v. Fitzgerald*, ____ U.S. ____, 102 S.Ct. 2690 (June 24, 1982). That doctrine was developed to assure the people that federal judges could and would exercise the judicial power impartially and without fear of the consequences to themselves of that exercise.

> This was a doctrine " 'not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences.' "

Nixon v. Fitzgerald, 102 S.Ct. 2690, 2700 [*quoting Pierson v. Ray*, 386 U.S. 47, 554 (1967), *quoting Scott v. Stansfield*, L.R. 3 Ex. 220, 223 (1868)]. Its importance is clear:

> In sum, our Constitution unambiguously enunciates a fundamental principle—that the "judicial Power of the United States" must be reposed in an independent Judiciary. It commands that the independence of the Judiciary be jealously guarded, and it provides clear institutional protections for that independence.

(footnote continued from preceding page)

(remedy for 'malice or corruption in their action whilst exercising their judicial function' is prosecution in the form of impeachment or as may be specially prescribed). But recently the Court has assumed that all judges could be criminally prosecuted [*see* authorities collected and relied upon by the court of appeals here (App. A, *infra*, 10a n.17 and 11a n.18)] without ever analyzing the structural consequences of applying that assumption to permit pre-removal prosecution of Article III judges [*see, e.g., Nixon v. Fitzgerald*, 102 S.Ct. 2690, 2710 (White J., dissenting)].

Northern Pipeline, 102 S.Ct. 2858, 2866 (plurality opinion).

The court of appeals declined to address the history or the function, and failed to analyze accurately the importance, of judicial independence. That court based its decision upon its conclusion that:

> [T]he miniscule increment in judicial independence that might be derived from the proposed rule would be outweighed by the tremendous harm that the rule would cause to another treasured value of our constitutional system: no man in this country is so high he is above the law.

(App. A, *infra*, at 10a.)

The basic premises underlying that conclusion are flawed. First, the assertion that the increment is "miniscule" cannot be reconciled with the Executive's own assertions, let alone the nature of our contemporary judicial system. Second, the conclusory characterization of the increment as miniscule cannot be reconciled with this Court's analysis or conclusion in *Northern*.[17]

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[17]In *Northern*, the Court was required to measure the 'increment in judicial independence' between Article III judges constitutionally guaranteed "life tenure, subject only to removal by impeachment . . . and a fixed and irreducible compensation" and the new bankruptcy judges appointed to fourteen year terms, subject to discipline or removal by the judicial councils, and guaranteed the salary protection afforded all federal civil officers, 102 S.Ct. 2858, 2862. A majority of the Justices were persuaded that the possibilities for interference by the Executive, Congress, and by judicial colleagues posed sufficient danger that Congress could not delegate mandatory jurisdiction over common law contract claims to such judges. *Id.* at 2880 (Rehnquist, J., concurring). The court of appeals's conclusory assertion that federal judges would gain only a "miniscule increment of judicial independence" from a constitutional rule denying the Executive a discretionary power to threaten individual judges cannot be reconciled with the conclusion reached by a majority of the Court or with the 'balancing' of legislative and judicial functions analysis employed by the dissenting justices in *Northern*, *Id.* at 2893-94 (White, J., dissenting).

Third, the assertion that the rule sought here would place judges 'above the law' is simply wrong. The accused judge here has never claimed that he is above the law, and the principles he advocates would not place him there. He claims no immunity; he claims only that, unless he chooses to resign, the Constitution defines the correct sequence by which his judicial conduct may be challenged and judged: impeachment and removal first, and then, *and only then,* prosecution and trial. He claims that both the Constitution and the doctrine of separation of powers confer upon him a right to insist that that sequence be followed.

In *Nixon,* this Court addressed the claim that immunity from civil liability for conduct in office would make the President a 'man so high he was above the law.' In rejecting the claim, the Court ruled:

> A rule of absolute immunity for the President will not leave the Nation without sufficient protection against misconduct on the part of the chief executive. There remains the constitutional remedy of impeachment.[39]
>
> . . . .
>
> The existence of alternative remedies and deterrents establishes that absolute immunity will not place the President "above the law." For the President, as for judges and prosecutors, absolute immunity merely precludes a particular private remedy for alleged misconduct in order to advance compelling public ends.

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[39]The same remedy plays a central role with respect to the misconduct of federal judges, who also possess absolute immunity. *See* Kaufman, *Chilling Judicial Independence,* 88 Yale L.J. 681, 690-706 (1979). Congressmen may be removed from office by a vote of their colleagues. U.S. Const. art. I, §5, cl. 2

102 S.Ct. at 2705-06 (other footnotes omitted).

The rule of absolute immunity from civil liability for the President or for federal judges may advance compelling public ends, but it does so at the expense of substantial private rights. In that context, the constitutional remedy of impeachment is a limited alternative: it protects "the public interest in the rule of law," but does nothing to remedy the private wrong.

A requirement that the constitutional remedy of impeachment precede the Executive's exercise of prosecutorial discretion against a federal judge advances a compelling public end: the interest of the people in having an independent Judiciary. It does so at the expense of neither public nor private rights. As a remedy for 'high Crimes and Misdemeanors' in office, the constitutional remedy is a true remedy. In that context it vindicates the same rights as the criminal laws. For a judge, it is a supplemental, not an alternative, remedy. Far from placing judges above the law, it subjects them to the law and defines the correct sequence of remedies for official misconduct. After a judge's removal from office, the Executive may prosecute and the Judiciary may judge him like any other man.

We aspire to have a 'government of laws, not of men;' but those laws must be administered by men, and we have always known that 'men entrusted with power tend to abuse it.' The judicial office exists to assure that we remain a government of laws. The guarantees of life tenure and irreducible compensation were given to insulate the judicial officer from the temptations of political ambition and the fear of personal consequence. Both the temptations and the fear encourage abuse of official power. Those guarantees were granted, not to protect the judge, but to assure the people that we would retain 'a government of laws, not of men.'

The court of appeals did not analyze these issues or this Court's decisions. As a result, the precedent created by its

decision threatens tremendous harm to another of the most treasured values of our constitutional system. That court yielded that which was not its to give: the right of the people to an independent Judiciary. This Court should not permit such a decision to stand as a precedent for the future unless it is fully satisfied that the delicate balance can be preserved.

7. The courts below refused to address a third and separate doctrine that this Court has consistently held necessary to an independent Judiciary. Impartiality and independence are the two conditions necessary to the constitutional exercise of the judicial power. That no judge shall preside in any case where he or she has interests that may be affected by the outcome has long been recognized as the minimum condition of impartiality.

Decisions required in this case will define privileges and immunities incident to the federal judicial office. If the proceedings in the court below continue, the trial judge will have to decide whether a federal judge's chambers, official papers, and conversations with his or her law clerks or others are entitled to any special protection or privileges by virtue of the judicial office. That judge will have to determine whether a jury of lay persons should be permitted to consider a district judge's opinion, the appellate opinions upon which it relied, and testimony about how the judge prepared it. Such evidence would be necessary to enable the jury to determine whether the accused judge's decision constituted an overt act in furtherance of a criminal conspiracy and whether any conversations the accused judge may have had concerning the decision evidenced an intent to obstruct justice. The judge who decides these questions will be resolving questions that substantially affect his own interests and the interests of every other federal judge.

This Court has already ruled that, in controversies between an Article III judge and another branch of government requiring construction of section 1 of Article III, the Judiciary is *as a matter of law* deprived of the required impartiality.

United States v. Will, 449 U.S. 200 (1980). There the doctrine of necessity compelled a reluctant Court to act because there was no other forum where the controversy could be adjudicated. Here, however, the necessity to proceed beyond the jurisdictional questions presented is not apparent. The Constitution established a forum in which a federal judge can be tried for the crimes alleged here.

Petitioner presented and fully developed this issue in both the lower courts. The trial court declined to discuss them, and the court of appeals chose to characterize them as "totally devoid of merit" (App. A, *infra*, at 11a n.20). The refusal of those courts to address this issue is inconsistent with the sensitivity this Court mandated in *Will*. The result the court of appeals reached conflicts both with *Will* and the mandate codified at 28 U.S.C. §455(a) and (b)(4) (1976 & Supp. IV 1981). The lack of sensitivity as well as the apparent conflict provide a substantial and independent ground for this Court's review.

8. The criminal prosecution of a federal judge must (as it has here) result in such substantial disruptions of the judicial business and departures from the accepted and usual course of judicial proceedings as to call for guidance from this Court in the exercise of its supervisory powers. The necessary and the probable disruptions are apparent. The Executive's decision to prosecute an active judge must necessarily cause considerable disruption in the management of the judicial business. The disruptions to the judicial business of the Southern District of Florida and the District of Maine illustrate the problems that must occur.[18]

[18]Unless the Executive chooses to use the confidential procedures available through the judicial councils, public disclosure of such charges to the House would cause substantial disruption in the accused judge's district. But use of the criminal process will always require that the Chief Justice of the United States select a judge to preside in the case and will require that that judge lay aside a portion of the business of his or her own district.

Far more significant disruptions, however, will flow from an acquitted judge's return to the bench. The practical effect of a criminal prosecution followed by an acquittal is that the Executive may have effectively disqualified the acquitted judge from exercising the judicial power. In the bitter aftermath of this litigation, Judge Hastings may be called upon to resume the role of impartial judge in controversies to which his present adversary is a party. It will thereafter be in the power of the government's attorneys to argue that the judge must disqualify himself because "his impartiality might reasonably be questioned." *See* 28 U.S.C. §455 (a) (Supp. IV 1981). Indeed, any individual criminal defendant might question whether a once-acquitted Judge Hastings would have the impartiality or independence to again challenge the Executive by ruling against it on difficult or close questions. It would be hard to rule that such a defendant has no reasonable grounds for such a challenge. *See Reid v. Covert*, 354 U.S. 1, 22 (1957).

The United States is party to all criminal and numerous and substantial civil actions in the district courts. Every litigant coming before those courts is entitled to an impartial assignment of judges. Every district judge is entitled to expect a fair distribution of the judicial work of the district. To cripple one judge is not fair to the judge crippled nor to the remaining judges nor to the litigants who come before that court. The Constitution does not provide for partial Article III judges.

The problems this case presented and the manner in which the court of appeals addressed them illustrate the kinds of special problems judicial prosecutions are likely to present, problems that only guidance from this Court can resolve. For example, petitioner suggested from the outset that disqualification by all judges of the Eleventh Circuit was appropriate. He pointed to the action the judges of the Second

and Seventh Circuits had taken when the appeals of Judges Manton and Kerner had come before their courts. He urged that the increased importance of the circuit judicial conference and the expanded administrative powers of the circuit judicial council enhanced the need for circuit disqualification. The court rejected that request without comment and then proceeded to pre-empt its normal screening and assignment procedures.[19]

The Judiciary has demonstrated that it has the ability to adapt its normal procedures to address the problems presented by the abnormal case. But the necessity for judges to create and employ special procedures to address the problems presented by a case which requires that federal judges exercise the judicial power to resolve charges brought by the Executive against another federal judge are unique and require special sensitivity. At a minimum, the procedures by which such cases are handled should be uniform among the circuits and designed to minimize the disruptions during and in the aftermath of these cases. The problems this case has caused and will create illustrate clearly the kinds of disruptions the Judiciary will have to confront if the practice is to continue. Simply stated, these disruptions may threaten the Judiciary's ability to administer its own affairs and cause reasonable observers to question the impartiality with which such cases are decided. This Court should exercise its supervisory jurisdiction to provide the necessary guidance.

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[19]The departures from the court's rules and practices are apparent from the dockets the court maintained for these cases and are summarized in petitioner's Petition for Rehearing and Suggestion for *En Banc* Rehearing, *United States v. Hastings*, Nos. 82-5262 and 82-5715 (11th Cir. 1982) (consolidated).

CONCLUSION

By its judgment, the court of appeals discarded a constitutional tradition that is now 282 years old. No *sitting* judge holding good behavior tenure has ever been criminally prosecuted and convicted for the manner in which he exercised the judicial power. For that reason, neither this Court nor the English courts have had to decide the questions presented here. It may be the tradition deserves to be discarded. But surely claret of that vintage should be savored carefully before it is rejected in favor of the *nouveau beaujolais* offered as replacement here.

Petitioner respectfully urges that this Court grant the petition and issue a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit to review the judgment that court entered against him.

Respectfully submitted,

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APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 82-5262

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

HONORABLE ALCEE L. HASTINGS,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Florida

No. 82-5715

IN RE:

THE HONORABLE ALCEE L. HASTINGS,
UNITED STATES DISTRICT JUDGE IN AND FOR
THE SOUTHERN DISTRICT OF FLORIDA,

Petitioner.

Petition for Writs of Mandamus and Prohibition

(July 12, 1982)

Before VANCE and ANDERSON, Circuit Judges, and
ALLGOOD*, District Judge.

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*The Honorable Clarence W. Allgood, U.S. District Judge for the Northern District of Alabama, sitting by designation.

VANCE, Circuit Judge:

In this case we are asked to decide whether an active federal judge can be subject to federal criminal prosecution for acts involving the exercise of his judicial authority. Appellant and petitioner in this case, Alcee L. Hastings, has served as a federal judge for the United States District Court for the Southern District of Florida since 1979.[1] On December 29, 1981 the federal grand jury in the southern district of Florida returned a four-count indictment against Hastings and William A. Borders, Jr. The indictment alleges that Hastings and Borders, an attorney from Washington, D.C., solicited and accepted a bribe from an undercover agent who was posing as a criminal defendant in a case that had been before Judge Hastings. The bribe was allegedly given in return for Hastings' agreement to reduce that defendant's prison sentence and to revoke an order that the defendant forfeit certain property. Hastings is charged in two counts of the indictment with conspiracy and obstruction of justice.[2]

The trial of Hastings and his codefendant, Borders, was scheduled to commence on March 22, 1982. On February 1, 1982, however, Hastings moved to quash the indictment. He argued that a federal district court does not have jurisdiction over the criminal prosecution of an active federal judge before

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[1]Judge Hastings was sworn into office on November 13, 1979.

[2]Specifically, appellant is charged with conspiracy to solicit and accept money in return for unlawful influence in the performance of lawful government functions in violation of 18 U.S.C. § 371, and with corruptly impeding due administration of justice in violation of 18 U.S.C. §§ 2 and 1503.

We note that appellant has voluntarily removed himself from his normal duties as judge during the pendency of the trial.

he is removed from office through the impeachment process. The trial judge denied the motion on February 17, 1982.[3]

Hastings filed an interlocutory appeal of the district court's order with this court. In order to ensure that the court of appeals had jurisdiction to hear the issues raised in the interlocutory appeal, Hastings also filed an application for writs of mandamus and prohibition with this court on June 17, 1982. We have consolidated the appeal and the application in this case. For reasons that appear below, we conclude that this court has jurisdiction to hear the interlocutory appeal and we therefore deny the application for writs without further discussion. *See Helstoski v. Meanor*, 442 U.S. 500, 506 (1979); *United States v. Denson*, 603 F.2d 1143, 1147 n.2 (5th Cir. 1979) (en banc); *National Equipment Rental, Ltd. v. Mercury Typesetting Co.*, 323 F.2d 784, 786 (2d Cir. 1963). We also conclude that the district court properly denied Hastings' motion to quash the indictment.

I. Jurisdiction of the Court of Appeals

As an initial matter, the government challenges our jurisdiction to hear this interlocutory appeal. Courts will hear a non-certified interlocutory appeal only if the subject of the appeal is a collateral matter that could not be reviewed effectively on appeal from final judgment. *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). The Supreme Court has held that

[3]On March 2, 1982 the district court granted the motion of appellant's codefendant, Borders, for change of venue to the northern district of Georgia. Borders was convicted after trial by jury on May 7, 1982. He has appealed his conviction to this court. No. 82-8302 (appeal docketed May 20, 1982). The venue for the trial of appellant remains in the southern district of Florida.

an interlocutory appeal from the denial of a motion to quash an indictment comes within the *Cohen* exception to the final judgment rule only when the right asserted by the criminal defendant would be irreparably lost if he were forced to undergo trial. *E.g., Helstoski v. Meanor,* 442 U.S. at 506-08 (interlocutory appeal on speech or debate clause grounds permissible); *Abney v. United States,* 431 U.S. 651, 660-62 (1977) (interlocutory appeal on double jeopardy grounds permissible); *see United States v. MacDonald,* 435 U.S. 850, 860 (1978) (interlocutory appeal on speedy trial grounds not allowed); *United States v. Gregory,* 656 F.2d 1132, 1134-35 (5th Cir. 1981) (interlocutory appeal on vindictive prosecution grounds not allowed).

In this case, appellant contends that as an active federal judge he has an absolute right not to be tried in a federal court unless and until he is impeached and convicted by Congress. Like the right secured by the speech or debate clause in *Helstoski* or the right secured by the double jeopardy clause in *Abney,* the right asserted by Hastings is the freedom from the obligation to endure a criminal trial which would be wholly deprived of meaning if he were forced to undergo trial before he could assert it. *See United States v. Brizendine,* 659 F.2d 215, 219 (D.C. Cir. 1981).

The government seeks to distinguish *Abney* and *Helstoski* on the ground that the rights asserted in those cases were based upon specific provisions in the Constitution while the right asserted by Hastings is based upon general principles of separation of powers. The government argues, in effect, that unless the right asserted by the criminal defendant is one that has a positive and well established basis in the law, the court of appeals should not exercise jurisdiction over the interlocutory appeal.

We do not accept the government's argument. Even though this appeal involves rights not heretofore recognized in our

jurisprudence, the assertion of those rights involves significant issues of interbranch comity and separation of powers, the resolution of which is at least the subject of fair debate. *See United States v. Myers*, 635 F.2d 932, 935-36 (2d Cir.) (congressman may challenge prosecution on separation of powers grounds on interlocutory appeal), *cert. denied*, 449 U.S. 956 (1980).[4] These issues have yet to be resolved definitively by the Supreme Court or by this circuit. *Cf. Fountain v. Metropolitan Atlanta Rapid Transit Authority*, 678 F.2d 1038, 1042 (11th Cir. 1982) (claim based upon federal law is not frivolous where, *inter alia*, no controlling authority negates the claim).

For these reasons, we believe it is both necessary and appropriate for this court to consider the existence of Hastings' asserted right to be free from prosecution before that assertion is rendered meaningless by the impending trial.[5]

II. The Motion to Quash the Indictment

Appellant's motion to quash the indictment rests upon two contentions: first, that Congress has the exclusive primary jurisdiction to try and punish a federal judge for high crimes and

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[4] We also note that under the procedure in *United States v. Dunbar*, 611 F.2d 985, 987-89 (5th Cir. 1980) (en banc), the trial court could have determined that the issues raised by Hastings were frivolous and then proceeded to trial without awaiting the determination of the court of appeals. Instead, the trial judge gave serious consideration to the legal points raised by the motion and has refrained from commencing trial pending the outcome of this appeal.

[5] We do not decide in this case whether the assertion of a right of freedom from the obligation to endure criminal trial which involves issues of lesser constitutional magnitude or which has a less tenable basis in existing law would warrant an interlocutory appeal. *See United States v. Myers*, 635 F.2d 932, 936 (2d Cir.) (balancing weight of right asserted against traditional concerns of judicial efficiency which prohibit interlocutory appeals), *cert. denied*, 449 U.S. 956 (1980).

misdemeanors through the impeachment process;[6] and second, that the principle of separation of powers prohibits the executive branch from seeking to prosecute an active federal judge for acts committed in his official capacity.

This Republic is fortunate that in its long history the federal courts have had only one previous occasion to address the constitutional problems posed by the criminal prosecution of a federal judge.[7] On that occasion, the United States Court of Appeals for the Seventh Circuit decided that contentions similar to those made by appellant here were without merit. *United States v. Isaacs*, 493 F.2d 1124 (7th Cir.), *cert. denied*, 417 U.S. 976 (1974). We are persuaded that *Isaacs* contains the correct statement of the law.

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[6]Under the impeachment articles of the Constitution, all civil officers of the United States are subject to impeachment. Art. II, § 4. It is beyond question that federal judges are included within the term "civil officers." Congressional Research Service, The Constitution of the United States of America: Analysis and Interpretation, S. Doc. No. 92-82, 92nd Cong., 2d Sess. 574-75 (1973) (hereinafter "Annotated Constitution").

[7]In addition to this case, there have been three other instances of criminal proceedings brought against active federal judges. Judge Francis Winslow of the southern district of New York was indicted in 1929 and resigned before trial commenced. Judge John Warren Davis of the third circuit court of appeals was indicted and stood trial twice before resigning in 1941. Neither of these men claimed that they were immune from criminal prosecution prior to impeachment. J. Borkin, *The Corrupt Judge*, 255-56 (1962). Finally, Judge Otto Kerner of the seventh circuit was indicted, tried, and convicted for crimes that he committed before he became a judge. He unsuccessfully raised the immunity issue in the direct appeal from his conviction. *United States v. Isaacs*, 493 F.2d 1124 (7th Cir.), *cert. denied*, 417 U.S. 976 (1974). *See* discussion in text *infra*.

Two federal judges were the subjects of criminal investigation but resigned before formal indictment. J. Borkin, *supra* at 23, 97. Nine federal judges have been impeached and brought to trial before the Senate. Annotated Constitution, *supra* note 6 at 574 n.10.

Appellant's first contention is based upon the literal language of article I, § 3, cl. 7 of the Constitution:

> Judgment in cases of impeachment shall not extend further than to removal from office, and disqualification to hold and enjoy any office of honor, trust, or profit under the United States; but the party convicted shall, nevertheless, be liable and subject to indictment, trial, judgment, and punishment, according to law.

According to appellant, this clause creates a constitutionally mandated sequence for the prosecution of a federal judge: first, Congress must act to remove him from office, and only then can the article III courts subject him to "trial, judgment and punishment, according to law."

We find no merit in appellant's argument. Rather, we agree with the seventh circuit that this portion of section 3 was intended "to assure that after impeachment a trial on criminal charges is not foreclosed by the principle of double jeopardy." *United States v. Isaacs*, 493 F.2d at 1142.[8] Read in this light, section 3 represents an attempt by the framers to anticipate and respond to questions that might arise regarding the procedural rights of the accused during the impeachment process. Like article III, § 2, cl. 3 which provides that the right to trial by jury does not extend to impeachment proceedings,[9] section 3 serves

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[8] *See also* E. Corwin, *The Constitution* 16 (H. Chase and C. Ducat 14th ed. 1978); I. R. Foster, *Commentaries on the Constitution* 505 (1895). In this respect the framers departed from English practice in which impeachment was a criminal proceeding to which "jeopardy of life or limb" attached. *See* R. Berger, *Impeachment: The Constitutional Problem* 80 (1973).

[9] "The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the State where the said crimes shall have been committed; but when not committed within any State, the trial shall be at such place or places as the Congress may by law have directed.

Art. III, §2, cl. 3

to clarify the rights of civil officers accused of high crimes and misdemeanors, not to limit the jurisdiction of article III courts.[10]

Appellant's second argument relies upon the principle of separation of powers. He contends that the courts would be subject to intolerable pressure from the executive if executive officers were allowed to prosecute active federal judges for acts involving the exercise of their judicial power.[11]

Appellant is of course correct that the independence of the judiciary from external pressures is a highly valued element of our constitutional system. *United States v. Will*, 449 U.S. 200, 217-18 (1980). That independence is already protected by *specific* provisions in the Constitution.[12] *See, e.g.*, art. I, §6, cl. 2

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[10]Appellant's argument taken to an extreme would also prohibit officers of the executive branch from seeking to prosecute a member of Congress. *See* discussion in *United States v. Isaacs*, 493 F.2d 1124, 1144 (7th Cir.), *cert. denied*, 417 U.S. 976 (1974). By parody of reasoning, a congressman might argue that since the Constitution provides that each house of Congress may expel a member by two-thirds vote, article I, §5, cl. 2, a congressman cannot be indicted or tried until he is expelled. It is, of course, too late in the constitutional day to accept such a proposition. *United States v. Brewster*, 408 U.S. 501 (1972); *United States v. Diggs*, 613 F.2d 988 (D.C. Cir. 1979), *cert. denied*, 446 U.S. 982 (1980).

Hastings also argues that a criminal conviction would be tantamount to removal from office. Since only Congress can remove a federal judge from office, he contends that a criminal trial is improper. This argument is meritless because it is based upon the false premise that conviction is equivalent to removal from office. *See Chandler v. Judicial Council of the Tenth Circuit*, 398 U.S. 74, 141-42 (1970) (Black, J., dissenting); *Burton v. United States*, 202 U.S. 344, 369 (1906).

[11]We recognize that Hastings' second argument does not apply with equal force to the conspiracy count of the indictment since that count does not necessarily involve acts in his judicial capacity. *See Braatelien v. United States*, 147 F.2d 888, 895 (8th Cir. 1945).

[12]Article III provides for the establishment of a court system as one of the separate but coordinate branches of the National Government . . . . These

(continued)

(incompatibility clause);[13] art. III, § 1 (life tenure clause)[14] (compensation clause).[15] Additionally, judges enjoy the same protection as do all citizens from vindictive prosecution by officers of the executive branch. *See United States v. Johnson*, 577 F.2d 1304, 1307 (5th Cir. 1978).[16] We are not persuaded that the proposed rule of absolute judicial immunity from federal

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(footnote continued from preceding page)

courts are presided over by judges appointed for life, subject only to removal by impeachment. Their compensation cannot be diminished during their continuance in office. The provisions of Article III were designed to give judges maximum freedom from possible coercion or influence by the executive or legislative branches of the Government.

United States ex rel. Toth v. Quarles, 350 U.S. 11, 15-16 (1955). *See also United States v. Isaacs*, 493 F.2d 1124, 1144 (7th Cir.), *cert. denied*, 417 U.S. 976 (1974):

With co-equal branches of government, the potential of abuse by any one of them is inherent. However, the system of checks and balances, a free press, and public resentment toward any attempted domination all work to preserve the guaranteed independence of each branch.

[13]No Senator or Representative shall, during the time for which he was elected, be appointed to any civil office under the authority of the United States, which shall have been created, or the emoluments whereof shall have been increased during such time; and no person holding any office under the United States shall be a member of either House during his continuance in office.

Art. I, §6, cl. 2.

[14]The judges, both of the Supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services a compensation which shall not be diminished during their continuance in office.

Art. III, § 1.

[15]See note 14, *supra*. *See generally United States v. Will*, 449 U.S. 200 (1980).

[16]The district court noted that "the record is totally devoid of any evidence whatsoever to support an allegation that the government's motivation in bringing these criminal charges was vindictive or retaliatory."

criminal prosecution is a necessary complement to the Constitution's explicit protections.[17] Indeed, the miniscule increment in judicial independence that might be derived from the proposed rule would be outweighed by the tremendous harm that the rule would cause to another treasured value of our constitutional system: no man in this country is so high that he is above the law. "It is the only supreme power in our system of government, and every man who by accepting office participates in its functions is only the more strongly bound to submit to that supremacy." *United States v. Lee*, 106 U.S. 196, 220 (1882). A judge no less than any other man is subject to the processes of the criminal law. *United States v. Isaacs*, 493 F.2d at 1133; *See*

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[17]In addition to the specific safeguards contained in the Constitution, federal and state judges enjoy an absolute common law immunity from *civil* liability for acts committed in their official capacities. *See Stump v. Sparkman*, 435 U.S. 349, 355-57 (1978); *Pierson v. Ray*, 386 U.S. 547, 554 (1967). This immunity is premised upon a calculation that the public benefit derived from the judicial independence created by the immunity outweighs the sacrifice suffered by aggrieved individuals who are deprived of their civil remedies. *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 349 (1872); *accord, Pierson v. Ray*, 386 U.S. at 554. This calculation does not operate to create absolute immunity for judges from criminal prosecution. *See O'Shea v. Littleton*, 414 U.S. 488, 503 (1974). A criminal proceeding, unlike a civil action, is not brought to vindicate an individual interest, but rather the public interest in law enforcement. The rule of absolute immunity from criminal prosecution of active federal judges for acts committed in their official capacities poses too great a threat to the public interest in the rule of law to be adopted by this court. *See* discussion in text *infra*. *Cf. Dennis v. Sparks*, 449 U.S. 24, 28 n.5 (1980) (state judge who is immune from civil liability is not immune from criminal liability).

We note that this is not a case in which a judge is prosecuted for acts in his official capacity undertaken in good faith. In such a case, there may exist a common law immunity from criminal prosecution. *See Braatelien v. United States*, 147 F.2d 888, 895 (8th Cir. 1945); *Commonwealth v. Tartar*, 239 S.W.2d 265, 266 (Ky. Ct. App. 1951). The existence of this limited immunity would further counsel against the creation of the absolute immunity urged by Hastings.

Dennis v. Sparks, 449 U.S. 24, 28 n.5 (1980); *Imbler v. Pachtman*, 424 U.S. 409, 429 (1976); *O'Shea v. Littleton*, 414 U.S. 488, 503 (1974).[18]

We decide today only that appellant may be prosecuted under the instant federal indictment.[19] We conclude that the district court was correct in denying appellant's motion to quash that indictment.[20] We therefore affirm the district court's order and deny the petition for writs. Let the mandate issue forthwith.

The interlocutory order of the district court is AFFIRMED; the petition for writs of mandamus and prohibition is DENIED.

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[18]*See also Chandler v. Judicial Council of the Tenth Circuit*, 398 U.S. 74, 140 (1979) (Douglas, J., dissenting); *id.* at 141-142 (Black, J., dissenting); *Braatelien v. United States*, 147 F.2d 888, 895 (8th Cir. 1945); *Strawbridge v. Bednarik*, 460 F. Supp. 1171, 1173 (E.D. Pa. 1978); *Shore v. Howard*, 414 F. Supp. 379, 385 (N.D. Tex. 1976).

[19]We do not address whether or under what circumstances an extended sentence of imprisonment might approach in substance removal from office.

[20]Hastings makes an additional argument that the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980, 28 U.S.C. § 372, includes a determination by Congress that active federal judges may not be prosecuted by officers of the executive. We find this argument to be totally devoid of merit. We similarly fail to find any merit in his argument that judges of the federal courts are incapable of treating his case in an impartial fashion.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA	)	
	)	Case No.
v.		81-596-Cr-ETG
	)	
WILLIAM A. BORDERS, JR., and ALCEE L. HASTINGS	)	

TRANSCRIPT OF PROCEEDINGS AT HEARING ON DEFENDANTS' NON-EVIDENTIARY PRETRIAL MOTIONS

Pursuant to notice, the above-entitled matter came on for hearing before Hon. Edward T. Gignoux, Chief Judge, United States District Court, District of Maine, sitting as a District Court Judge in the Southern District of Florida by designation of the Chief Justice, at the United States Courthouse, Miami, Florida, on Wednesday, February 17, 1982, which proceedings were as follows:

* * *

THE COURT: The matter before the Court is the motion of the Defendant Alcee L. Hastings to quash the indictment and to dismiss this proceeding for lack of jurisdiction. The Court has received and had the benefit of competent briefing by counsel for that defendant and counsel for the United States and of the oral arguments which the Court has just heard. The Court has had the benefit of completing its own research and particularly of reference to the only appellate decision — the only court decision — treating of the question here presented which is, of

course, the opinion of the United States Court of Appeals for the Seventh Circuit in the case involving United States Circuit Judge Kerner, *U.S. v. Isaacs*, 493 F.2d 1124, 1140-44 (7th Cir.), *cert. den.*, 417 U.S. 976 (1974).

The Court will be filing, within the next few days, a memorandum opinion setting forth its views. For present purposes, the Court will state simply that it is persuaded, as was the United States Court of Appeals for the Seventh Circuit, that the United States Constitution does not forbid the trial of a Federal Judge for criminal offenses committed either before or after the assumption by him of judicial office and that this Court has jurisdiction to try the defendant in the present case. The Court recognizes that the — so far as the research of counsel and the Court's own research discloses — this is the first instance in which a sitting Federal Judge has been criminally prosecuted for acts alleged to have been committed in the course of discharging his official duty.

In the *Isaacs* case, the criminal conduct with which Judge Kerner was charged did not involve the performance of his official acts as a Judge. The Court of Appeals in that case, however, squarely held that the Constitution does not prohibit the criminal prosecution of a Federal Judge prior to his impeachment, and, as indicated, for reasons which the Court will set out more fully in the memorandum which will be filed within the next several days, this Court agrees. The instant motion is denied. The Court will enter, during the course of the day, a brief order denying the motion for reasons to be set forth in the memorandum opinion which will be filed. This is a question, a constitutional question which, as the Court has indicated, has not been resolved by any — by the United States Supreme Court, which is, of course, the final arbiter. The Court senses that the order which the Court will be entering today is an order, or will be an order, which is appealable as an interlocutory

appeal under the analogy to the Cohen doctrine, most recently discussed by the United States Supreme Court in *Helstoski v. Meanor,* 442 U.S. 500 (1979). In the event this order is to be appealed, the Court's understanding is the appeal period is 10 days. If an appeal is to be taken at this time, the Court will change the general character of the case.

* * *

THE COURT: The order denying the Defendant Hastings' motion to quash the indictment and dismiss the proceedings for lack of jurisdiction will be entered following this 10-minute recess. The memorandum opinion, which is in draft form, predicated upon the very splendid briefs, and so forth, will be filed some time next week. Essentially, as Professor Anderson is undoubtedly aware, the analysis of the *Isaacs* case is, in this Court's view, persuasive, but the Court does recognize that the Supreme Court of the United States will have the final say and that Court has disagreed with this Court on a limited number of occasions, but that's probably only because many of my rulings don't reach the Supreme Court of the United States.

* * *

CERTIFICATE

I hereby certify that the foregoing is a true and complete transcript of the proceedings above described, all of said proceedings having been reported verbatim by me on the date indicated heretofore.

/s/ Harry B. Derry

OFFICIAL COURT REPORTER

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA	:	
Plaintiff:	:	
v.	:	Case No. 81-596-Cr-ETG
WILLIAM A. BORDERS, JR. and ALCEE L. HASTINGS,	:	
Defendants:	:	

ORDER DENYING HASTINGS' MOTION TO QUASH INDICTMENT AND DISMISS PROCEEDINGS FOR LACK OF JURISDICTION

Hearing having been had this date upon defendant Hastings' motion to quash indictment and dismiss proceedings for lack of jurisdiction; and the United States having been represented by its counsel, Reid H. Weingarten, Esq., and Robert I. Richter, Esq., United States Department of Justice, Criminal Division, Public Integrity Section, Washington, D.C.; and defendant having been represented by his counsel, Joel Hirschhorn, Esq., Miami, William Waterman, Esq., Pontiac, Michigan, and Terence J. Anderson, Esq., Coral Gables, Florida (as counsel to Joel Hirschhorn, Esq.); and the Court having considered the written and oral arguments of counsel; for the reasons set forth in the Memorandum Opinion to be filed herewith, it is

ORDERED that defendant's motion to quash indictment and to dismiss proceedings for lack of jurisdiction is DENIED.

Dated at Miami, Florida, this 17th day of February 1982.

/s/ Edward T. Gignoux

United States District Judge
Serving by designation

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA	:	
Plaintiff:	:	
v.	:	Case No. 81-596-Cr-ETG
WILLIAM A. BORDERS, JR. and ALCEE L. HASTINGS, Defendants:	:	

MEMORANDUM OPINION TO ACCOMPANY ORDER DENYING DEFENDANT HASTINGS' MOTION TO QUASH INDICTMENT AND DISMISS PROCEEDINGS FOR LACK OF JURISDICTION

On December 29, 1981 a four-count indictment was returned against Alcee L. Hastings, a United States District Judge for the Southern District of Florida, and William A. Borders, Jr., an attorney in Washington, D.C. Counts I and II of the indictment charge the two defendants with conspiracy to solicit bribes, 18 U.S.C. §§201(c), 371 (Count I), and obstruction of justice, 18 U.S.C. §1503 (Count II).[1] Hastings has filed a motion to quash the indictment and to dismiss the proceedings against him on the ground "that the Grand Jury lacked jurisdiction to indict jurisdiction to try him for offenses of the nature charged." His contention is that the Constitution prohibits the criminal pro-

[1]Counts III and IV charge Borders alone with violations of the Travel Act, 18 U.S.C. § 1952.

secution of a federal judge for acts relating to his conduct as a judge prior to his removal from office by impeachment or resignation. He argues that both the text of the Constitution, in particular, art. I, § 3, cl. 7;[2] art. II, § 4;[3] and art. III, § 1,[4] and the principle of separation of powers compel the conclusion that a federal judge must be removed from office by impeachment or resignation before he can be criminally prosecuted.

So far as the research of the Court and counsel discloses, this is the first instance in which a sitting federal judge has been criminally prosecuted for acts alleged to have been committed in connection with the performance of his judicial duties. However, in *United States v. Isaacs*, 493 F.2d 1124, 1140-44 (7th Cir.), *cert. denied*, 417 U.S. 976 (1974), a special panel of the United States Court of Appeals for the Seventh Circuit addressed the question of whether a sitting federal judge can be criminally prosecuted. Although in that instance the judge, United States Circuit Judge Otto Kerner, Jr., was charged with

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[2]Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.

U.S. Const. art. I, § 3, cl. 7.

[3]The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

U.S. Const. art. II, § 4.

[4]The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior. . . .

U.S. Const. art. III, § 1.

[5]No such prosecutorial misconduct is alleged in this case and, indeed, defendant concedes that his motion does not "challenge the government's conduct in the investigation and decision to seek and prosecute this indictment." Defendant's Memorandum at 3, n.1.

criminal conduct which was not related to the performance of his official acts as a judge, the court squarely held that "[t]he Constitution does not forbid the trial of a federal judge for criminal offenses committed either before or after the assumption of judicial office." *Id.* at 1142. The *Isaacs* court comprehensively analyzed and flatly rejected both of the constitutional arguments made by defendant in the present case. *Id.* at 1140-44. The court concluded:

> On the basis of the text of the Constitution, its background, its contemporaneous construction, and the pragmatic consequences of its provisions on impeachment, we are convinced that a federal judge is subject to indictment and trial before impeachment and that the district court had jurisdiction to try defendant Kerner.

Id. at 1144. This Court fully concurs with the analysis and conclusion of the *Isaacs* court that there is no constitutional bar to the criminal prosecution of a sitting federal judge.

Only one further comment is necessary. Defendant contends that the present case "presents a much narrower issue" than *Isaacs*. He points out that defendant "has exercised the judicial power adversely to positions asserted by the executive branch in several controversial cases," and suggests that a much greater threat is posed to the independence of the judiciary in the present case than in *Isaacs*. The short answer to this argument is that the record is totally devoid of any evidence whatsoever to support an allegation that the government's motivation in bringing these criminal charges was vindictive or retaliatory.[5] Moreover, the potential for abuse by the executive branch of its power to initiate prosecutions cannot justify insulating members of the judicial branch from prosecution for violation of the criminal laws, particularly in view of the other mechanisms which exist for dealing with any such abuse, should it occur. *See, e.g., United States v. Johnson*, 577 F.2d 1304, 1308 (5th

Cir. 1978); *United States v. Myers*, 635 F.2d 932, 940-41 (2d Cir.), *cert. denied*, 449 U.S. 956 (1980). As the *Isaacs* court observed:

> With co-equal branches of government, the potential of abuse by any of them is inherent. However, the system of checks and balances, a free press, and public resentment toward any attempted domination all work to preserve the guaranteed independence of each branch.

United States v. Isaacs, supra, 493 F.2d at 1144. *See also United States v. Brewster*, 408 U.S. 501, 521-25, 522 n.16 (1972).

The Court holds that the grand jury had jurisdiction to indict and this Court has jurisdiction to try defendant Hastings for the offenses charged in the present indictment. An order has been entered denying defendant's motion to quash indictment and dismiss proceedings for lack of jurisdiction.

Dated this 25th day of February 1982.

/s/ Edward T. Gignoux

United States District Judge
Serving by designation

APPENDIX C

United States Court of Appeals
FOR THE ELEVENTH CIRCUIT

No. 82-5262
D.C. Docket No. 81-596-CR-ETG

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

HONORABLE ALCEE L. HASTINGS,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Florida

No. 82-5715

IN RE:

THE HONORABLE ALCEE L. HASTINGS,
UNITED STATES DISTRICT JUDGE IN AND FOR
THE SOUTHERN DISTRICT OF FLORIDA,

Petitioner.

Petition for Writs of Mandamus and Prohibition

Before VANCE and ANDERSON, Circuit Judges, and ALLGOOD*, District Judge

*Honorable Clarence W. Allgood, U.S. District Judge for the Northern District of Alabama, sitting by designation.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the order of the District Court appealed from, in this cause be, and the same is hereby, AFFIRMED.

July 12, 1982

A True Copy
Attested
Clerk, U.S. Court of Appeals
for the Eleventh Circuit

/s/ June Phillips
Deputy Clerk 7/12/82

Issued as Mandate JUL 12, 1982
Atlanta, Georgia

IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 82-5262

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

HONORABLE ALCEE L. HASTINGS,

Defendant-Appellant.

No. 82-5715

IN RE: HONORABLE ALCEE L. HASTINGS,

Petitioner.

Appeal from the United States District Court
for the Southern District of Florida

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion *U.S. v. HASTINGS*, 11 Cir., 1982, 681 F.2d 706).

(SEPTEMBER 22, 1982)

Before VANCE and ANDERSON, Circuit Judges, and ALLGOOD*, District Judge.

PER CURIAM:

The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ ROBERT S. VANCE

United States Circuit Judge

*Hon. Clarence W. Allgood, U.S. District Judge for the Northern District of Alabama, sitting by designation.

APPENDIX D

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA,	)
Plaintiff,	) CRIMINAL NO. 81-596-CR-ETG
v.	) Violations of 18 U.S.C. 371 (conspiracy); 18 U.S.C. 1503 (obstruction of justice);
WILLIAM A. BORDERS, JR. and ALCEE L. HASTINGS,	) 18 U.S.C. 2 (aiding and abetting); 18 U.S.C. 1952 (Travel Act)
Defendants.	)

INDICTMENT

THE GRAND JURY CHARGES:

COUNT I

1. From on or about September 10, 1981 until October 9, 1981 and at all times pertinent to this indictment, WILLIAM A. BORDERS, JR., defendant herein, was an attorney living in Washington, D.C.

2. From on or about September 10, 1981 until October 9, 1981 and at all times pertinent to this indictment, ALCEE L. HASTINGS, defendant herein, was a United States District Court Judge in the Southern District of Florida.

3. At all times pertinent to this indictment, Paul Rico, a retired agent of the Federal Bureau of Investigation, acted in an undercover capacity for the Government and posed as Frank Romano, who, along with his brother, Thomas Romano, had been convicted by a jury on December 23, 1980 of racketeering charges after a trial before defendant ALCEE L. HASTINGS and had been sentenced by defendant ALCEE L. HASTINGS on July 8, 1981.

4. Beginning on or about September 10, 1981 (the exact date being unknown to the Grand Jury) and continuing until on or about October 9, 1981, in the Southern District of Florida and elsewhere, defendants WILLIAM A. BORDERS, JR. and ALCEE L. HASTINGS did willfully and knowingly combine, conspire, confederate and agree together to:

(a) violate Title 18, United States Code, Section 201(c), to wit: the defendants WILLIAM A. BORDERS, JR. and ALCEE L. HASTINGS did conspire and agree together corruptly to ask, solicit, seek, accept, receive and agree to receive, directly or indirectly, a sum of money for themselves in return for defendant ALCEE L. HASTINGS being influenced in his performance of official acts as a United States District Judge; and

(b) defraud the United States of America and the people of the United States in connection with the performance of lawful governmental functions:

(1) of and concerning the right of the United States and its citizens to have the lawful functions of the federal judiciary exercised and administered free from corruption, conflict of interest, fraud and obstruction;

(2) of and concerning the right of the United States and its citizens to the conscientious, faithful, disinterested and unbiased judgments and actions of the defendant ALCEE L. HASTINGS as a United States District Court Judge, free from

fraud, corruption, partiality, dishonesty, conflict of interest, and improper influences.

5. It was an object of the conspiracy that defendants WILLIAM A. BORDERS, JR. and ALCEE L. HASTINGS would agree to receive money from criminal defendants who appeared before Judge Hastings in return for promises that Judge Hastings would perform acts in his official capacity on behalf of said criminal defendants.

6. It was also an object of the conspiracy that defendants WILLIAM A. BORDERS, JR. and ALCEE L. HASTINGS would perform and promise to perform acts to affect cases that were before defendant ALCEE L. HASTINGS, including defendant ALCEE L. HASTINGS making legal rulings and WILLIAM A. BORDERS, JR. giving directions to criminal defendants whom he did not represent, all acts done to facilitate improper payments made by these criminal defendants to defendants WILLIAM A. BORDERS, JR. and ALCEE L. HASTINGS.

7. It was part of said conspiracy that defendants WILLIAM A. BORDERS, JR. and ALCEE L. HASTINGS would receive $150,000 from someone they believed to be Frank Romano, in return for Judge Hastings reducing the sentences he had previously imposed against the Romano brothers.

8. It was further part of said conspiracy that defendant WILLIAM A. BORDERS, JR. would meet with someone he believed to be Frank Romano, and set the terms of the $150,000 payment.

9. It was further part of said conspiracy between the defendants that the terms of the $150,000 payment would be as follows:

(a) Defendant ALCEE L. HASTINGS would have dinner at 8:00 p.m. on September 16, 1981 at a restaurant in the Miami area selected by the Romanos as proof of defendant

ALCEE L. HASTINGS' participation in the bribery scheme;

(b) The Romanos would make an "up front" payment to defendant WILLIAM A. BORDERS, JR. on September 19, 1981 as demonstration of their good faith;

(c) Defendant ALCEE L. HASTINGS would issue an order returning a substantial portion of property owned by the Romano brothers that defendant ALCEE L. HASTINGS had ordered forfeited as part of the criminal penalties imposed against the Romano brothers;

(d) The Romanos would pay the remaining portion of the $150,000 payment;

(e) The Romanos would file a motion to mitigate the three-year prison sentences that had been imposed against them on July 8, 1981 by defendant ALCEE L. HASTINGS; and

(f) Defendant ALCEE L. HASTINGS would re-sentence the Romanos and eliminate the prison sentences he had originally imposed against them.

OVERT ACTS

In furtherance of the conspiracy, the following overt acts, among others, were committed:

1. On or about September 12, 1981, in the Southern District of Florida, defendant WILLIAM A. BORDERS, JR. met with Paul Rico, posing as Frank Romano, and discussed the $150,000 bribe that would be paid to reduce the sentences that had been imposed by defendant ALCEE L. HASTINGS against the Romano brothers.

2. On or about September 16, 1981, in the Southern District of Florida, defendant ALCEE L. HASTINGS had dinner at the Fontainbleu Hotel on Miami Beach.

3. On or about September 19, 1981, in the Southern District of Florida, defendant WILLIAM A. BORDERS, JR. received $25,000 from Paul Rico, posing as Frank Romano, as good faith "up front" money of the $150,000 payoff.

4. On or about October 6, 1981, in the Southern District of Florida, defendant ALCEE L. HASTINGS issued an order in which he ordered the return of a substantial portion of property belonging to the Romano brothers that he had previously ordered forfeited.

5. On or about October 7, 1981, defendant WILLIAM A. BORDERS, JR. telephoned Paul Rico, posing as Frank Romano, in the Southern District of Florida and requested that Rico come to Washington, D.C. to pay him the remaining $125,000 of the bribe.

6. On or about October 9, 1981, defendant WILLIAM A. BORDERS, JR. met with Paul Rico at a motel in Arlington, Virginia to receive the remaining $125,000 of the bribe.

(In violation of Title 18, United States Code, Section 371)

COUNT II

1. The allegations of paragraphs one through three of this Indictment are realleged herein as though fully set forth.

2. From on or about September 10, 1981 (the exact date being unknown to the Grand Jury) and continuing until October 9, 1981 in the Southern District of Florida and elsewhere, the defendants WILLIAM A. BORDERS, JR. and ALCEE L. HASTINGS, acting unlawfully, willfully and knowingly and aiding and abetting each other, did corruptly influence, obstruct and impede and endeavor to influence, obstruct and impede the due administration of justice in that during the aforesaid period of time:

(a) Defendant ALCEE L. HASTINGS did disclose to defendant WILLIAM A. BORDERS, JR. the substance of a judicial order in the case captioned *United States v. Romano*, 78-364-CR-ALH, that had not yet been issued by defendant ALCEE L. HASTINGS;

(b) Defendant ALCEE L. HASTINGS did give to defendant WILLIAM A. BORDERS, JR. advance notice as to when a judicial order in the case captioned *United States v. Romano*, 78-364-CR-ALH, would be issued;

(c) Defendant ALCEE L. HASTINGS did issue an order in the case captioned *United States v. Romano*, 78-364-CR-ALH, wherein the content and timing of said order were consistent with the information defendant ALCEE L. HASTINGS had previously given to defendant WILLIAM A. BORDERS, JR.;

(d) Defendant WILLIAM A. BORDERS, JR. did reveal to an individual be believed to be a defendant in the case captioned *United States v. Romano*, 78-364-CR-ALH, information that had been disclosed to him by defendant ALCEE L. HASTINGS and described in paragraphs (a) and (b) of this Count; and

(e) Defendant WILLIAM A. BORDERS, JR. did instruct an individual he believed to be a defendant in the case captioned *United States v. Romano*, 78-364-CR-ALH, while not representing that individual and knowing that individual to have an attorney, to take various steps, including withdrawing his appeal to the Fifth Circuit, with all said acts done by defendants ALCEE L. HASTINGS and WILLIAM A. BORDERS, JR. to manipulate and interfere with the judicial process in the case captioned *United States v. Romano*, 78-364-CR-ALH, for the purpose of advancing their own private interests.

(In violation of Title 18, United States Code, Section 1503 and 2)

COUNT III

1. The allegations of paragraphs one through three of this Indictment are realleged herein as though fully set forth.

2. On or about September 11 and 12, 1981, within the Southern District of Florida and elsewhere, the defendant WILLIAM A. BORDERS, JR. did unlawfully, willfully and knowingly travel in interstate commerce from the District of Columbia through the State of Virginia and into the Southern District of Florida with the intent to promote, establish, carry on and facilitate the promotion, establishment, and carrying on of unlawful activity, said unlawful activity being bribery, in violation of Title 18, United States Code, Section 201, and the defendant WILLIAM A. BORDERS, JR. did thereafter perform and attempt to perform acts to promote, carry on and facilitate the promotion and carrying on of said unlawful activity.

(In violation of Title 18, United States Code, Section 1952)

COUNT IV

1. The allegations of paragraphs one through three of this Indictment are realleged herein as though fully set forth.

2. On or about September 18 and 19, 1981, within the Southern District of Florida and elsewhere, the defendant WILLIAM A. BORDERS, JR. did unlawfully, willfully and knowingly travel in interstate commerce from the District of Columbia through the State of Virginia and into the Southern District of Florida with the intent to promote, establish, carry on and facilitate the promotion, establishment, and carrying on of unlawful activity, said unlawful activity being bribery, in violation of Title 18, United States Code, Section 201, and the defendant WILLIAM A. BORDERS, JR. did thereafter perform and attempt to perform acts to promote, carry on and facilitate the promotion and carrying on of said unlawful activity.

(In violation of Title 18, United States Code, Section 1952)

A TRUE BILL

/s/ Joan B. Gray

FOREMAN

/s/ Gerald E. McDowell

GERALD E. McDOWELL, Chief
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/s/ Reid H. Weingarten

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U.S. Department of Justice

APPENDIX E

CONSTITUTIONAL AND STATUTORY PROVISIONS

Constitution of the United States

ARTICLE I.

Section 1.

All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Section 2, clause 5.

The House of Representatives shall chuse their Speaker and other Officers; and shall have the sole Power of Impeachment.

Section 3, clause 6.

The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.

Section 3, clause 7.

Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.

ARTICLE II.

Section 1, clause 1.

> The executive Power shall be vested in a President of the United States of America. . . .

Section 2, clause 1.

> The President shall * * * have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.

Section 2, clause 2.

> . . . [H]e shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law. . . .

Section 3.

> . . . He shall take Care that the Laws be faithfully executed, ...

Section 4.

> The President, Vice President and all Civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

ARTICLE III.

Section 1.

> The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and

inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Section 2, clause 1.

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; — to all Cases affecting Ambassadors, other public Ministers and Consuls; — to all Cases of admiralty and maritime Jurisdiction; — to Controversies to which the United States shall be a Party; — to Controversies between two or more States; — between a State and Citizens of another State; — between Citizens of different States; — between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

Section 3, clause 3.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; . . . .

United States Code

Title 28

§372. Retirement for disability; substitute judge on failure to retire; judicial discipline

(c)(1) Any person alleging that a circuit, district, or bankruptcy judge, or a magistrate, has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts, or alleging that such a judge or magistrate is unable to discharge all the duties of office by reason of mental or physical disability, may file with the clerk of the court of appeals for the circuit a written complaint containing a brief statement of the facts constituting such conduct.

(2) Upon receipt of a complaint filed under paragraph (1) of this subsection, the clerk shall promptly transmit such complaint to the chief judge of the circuit, or, if the conduct complained of is that of the chief judge, to that circuit judge in regular active service next senior in date of commission (hereafter, for purposes of this subsection only, included in the term "chief judge"). The clerk shall simultaneously transmit a copy of the complaint to the judge or magistrate whose conduct is the subject of the complaint.

(3) After expeditiously reviewing a complaint, the chief judge, by written order stating his reasons, may —

(A) dismiss the complaint, if he finds it to be (i) not in conformity with paragraph (1) of this subsection, (ii) directly related to the merits of a decision or procedural ruling, or (iii) frivolous; or

(B) conclude the proceeding if he finds that appropriate corrective action has been taken.

The chief judge shall transmit copies of his written order to the complainant and to the judge or magistrate whose conduct is the subject of the complaint.

(4) If the chief judge does not enter an order under paragraph (3) of this subsection, such judge shall promptly —

(A) appoint himself and equal numbers of circuit and district judges of the circuit to a special committee to investigate the facts and allegations contained in the complaint;

(B) certify the complaint and any other documents pertaining thereto to each member of such committee; and

(C) provide written notice to the complainant and the judge or magistrate whose conduct is the subject of the complaint of the action taken under this paragraph.

(5) Each committee appointed under paragraph (4) of this subsection shall conduct an investigation as extensive as it considers necessary, and shall expeditiously file a comprehen-

sive written report thereon with the judicial council of the circuit. Such report shall present both the findings of the investigation and the committee's recommendations for necessary and appropriate action by the judicial council of the circuit.

(6) Upon receipt of a report filed under paragraph (5) of this subsection, the judicial council —

(A) may conduct any additional investigation which it considers to be necessary;

(B) shall take such action as is appropriate to assure the effective and expeditious administration of the business of the courts within the circuit, including, but not limited to, any of the following actions:

(i) directing the chief judge of the district of the magistrate whose conduct is the subject of the complaint to take such action as the judicial council considers appropriate;

(ii) certifying disability of a judge appointed to hold office during good behavior whose conduct is the subject of the complaint, pursuant to the procedures and standards provided under subsection (b) of this section;

(iii) requesting that any such judge appointed to hold office during good behavior voluntarily retire, with the provision that the length of service requirements under section 371 of this title shall not apply;

(iv) ordering that, on a temporary basis for a time certain, no further cases be assigned to any judge or magistrate whose conduct is the subject of a complaint;

(v) censuring or reprimanding such judge or magistrate by means of private communication;

(vi) censuring or reprimanding such judge or magistrate by means of public announcement; or

(vii) ordering such other action as it considers appropriate under the circumstances, except that (I) in no circumstances may the council order removal from office of any judge ap-

pointed to hold office during good behavior, and (II) any removal of a magistrate shall be in accordance with section 631 of this title and any removal of a bankruptcy judge shall be in accordance with section 153 of this title; and

(C) shall immediately provide written notice to the complainant and to such judge or magistrate of the action taken under this paragraph.

(7)(A) In addition to the authority granted under paragraph (6) of this subsection, the judicial council may, in its discretion, refer any complaint under this subsection, together with the record of any associated proceedings and its recommendations for appropriate action, to the Judicial Conference of the United States.

(B) In any case in which the judicial council determines, on the basis of a complaint and an investigation under this subsection, or on the basis of information otherwise available to the council, that a judge appointed to hold office during good behavior has engaged in conduct —

(i) which might constitute one or more grounds for impeachment under article I of the Constitution; or

(ii) which, in the interest of justice, is not amenable to resolution by the judicial council,

the judicial council shall promptly certify such determination, together with any complaint and a record of any associated proceedings, to the Judicial Conference of the United States.

(C) A judicial council acting under authority of this paragraph shall, unless contrary to the interests of justice, immediately submit written notice to the complainant and to the judge or magistrate whose conduct is the subject of the action taken under this paragraph.

(8) Upon referral or certification of any matter under paragraph (7) of this subsection, the Judicial Conference, after consideration of the prior proceedings and such additional in-

vestigation as it considers appropriate, shall by majority vote take such action, as described in paragraph (6)(B) of this subsection, as it considers appropriate. If the Judicial Conference concurs in the determination of the council, or makes its own determination, that consideration of impeachment may be warranted, it shall so certify and transmit the determination and the record of proceedings to the House of Representatives for whatever action the House of Representatives considers to be necessary.

(9)(A) In conducting any investigation under this subsection, the judicial council, or a special committee appointed under paragraph (4) of this subsection, shall have full subpoena powers as provided in section 332(d) of this title.

(B) In conducting any investigation under this subsection, the Judicial Conference, or a standing committee appointed by the Chief Justice under section 331 of this title, shall have full subpoena powers as provided in that section.

(10) A complainant, judge, or magistrate aggrieved by a final order of the chief judge under paragraph (3) of this subsection may petition the judicial council for review thereof. A complainant, judge, or magistrate aggrieved by an action of the judicial council under paragraph (6) of this subsection may petition the Judicial Conference of the United States for review thereof. The Judicial Conference, or the standing committee established under section 331 of this title, may grant a petition filed by a complainant, judge, or magistrate under this paragraph. Except as expressly provided in this paragraph, all orders and determinations, including denials of petitions for review, shall be final and conclusive and shall not be judicially reviewable on appeal or otherwise.

(11) Each judicial council and the Judicial Conference may prescribe such rules for the conduct of proceedings under this subsection, including the processing of petitions for review, as each considers to be appropriate. Such rules shall contain provisions requiring that —

(A) adequate prior notice of any investigation be given in writing to the judge or magistrate whose conduct is the subject of the complaint;

(B) the judge or magistrate whose conduct is the subject of the complaint be afforded an opportunity to appear (in person or by counsel) at proceedings conducted by the investigating panel, to present oral and documentary evidence, to compel the attendance of witnesses or the production of documents, to cross-examine witnesses, and to present argument orally or in writing; and

(C) the complainant be afforded an opportunity to appear at proceedings conducted by the investigating panel, if the panel concludes that the complainant could offer substantial information.

Any rule promulgated under this subsection shall be a matter of public record, and any such rule promulgated by a judicial council may be modified by the Judicial Conference.

(12) No judge or magistrate whose conduct is the subject of an investigation under this subsection shall serve upon a special committee appointed under paragraph (4) of this subsection, upon a judicial council, upon the Judicial Conference, or upon the standing committee established under section 331 of this title, until all related proceedings under this subsection have been finally terminated.

(13) No person shall be granted the right to intervene or to appear as amicus curiae in any proceeding before a judicial council or the Judicial Conference under this subsection.

(14) All papers, documents, and records of proceedings related to investigations conducted under this subsection shall be confidential and shall not be disclosed by any person in any proceeding unless —

(A) the judicial council of the circuit, the Judicial Conference of the United States, or the Senate or the House of Representatives by

resolution, releases any such material which is believed necessary to an impeachment investigation or trial of a judge under article I of the Constitution; or

(B) authorized in writing by the judge or magistrate who is the subject to the complaint and by the chief judge of the circuit, the Chief Justice, or the chairman of the standing committee established under section 331 of this title.

(15) Each written order to implement any action under paragraph (6)(B) of this subsection, which is issued by a judicial council, the Judicial Conference, or the standing committee established under section 331 of this title, shall be made available to the public through the appropriate clerk's office of the court of appeals for the circuit. Unless contrary to the interests of justice, each such order issued under this paragraph shall be accompanied by written reasons therefor.

(16) Except as expressly provided in this subsection, nothing in this subsection shall be construed to affect any other provision of this title, the Federal Rules of Civil Procedure, the Federal Rules of Criminal Procedure, the Federal Rules of Appellate Procedure, or the Federal Rules of Evidence.

(17) The Court of Claims, the Court of Customs and Patent Appeals, and the Customs Court shall each prescribe rules, consistent with the foregoing provisions of this subsection, establishing procedures for the filing of complaints with respect to the conduct of any judge of such court and for the investigation and resolution of such complaints. In investigating and taking action with respect to any such complaint, each such court shall have the powers granted to a judicial council under this subsection.

(As amended Oct. 10, 1980, Pub. L. 96-417, title V, § 501(9), 94 Stat. 1742; Oct. 15, 1980, Pub. L. 96-458, § 3(a), (b), 94 Stat. 2036, 2040.)
28 U.S.C. §372(c) (Supp. IV 1981)

§ 455. Disqualification of justice, judge, or magistrate

(a) Any justice, judge or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

* * *

(4)He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

* * *

28 U.S.C. §455 (1976 & Supp. IV 1981)

Supreme Court, U.S.
FILED
JAN 20 1983
ALEXANDER L. STEVAS
CLERK

No. 82-863

In the Supreme Court of the United States

OCTOBER TERM, 1982

ALCEE L. HASTINGS, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether an active federal judge must be impeached before he can be indicted and prosecuted for federal crimes involving the misuse of his judicial authority.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is reported at 681 F.2d 706. The opinion of the district court (Pet. App. 16a-19a) is not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 20a-21a) was entered on July 12, 1982. A petition for rehearing was denied on September 22, 1982 (Pet. App. 22a). The petition for a writ of certiorari was filed on (Monday) November 22, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

On December 29, 1981, a four-count indictment (Pet. App. 23a-30a) was returned against petitioner and William A. Borders, Jr., in the United States District Court for the Southern District of Florida. The indictment charged that

petitioner, a United States District Judge in the Southern District of Florida, and Borders, an attorney from Washington, D.C., solicited and accepted a bribe from an undercover agent who was posing as a criminal defendant in a case that had been pending before petitioner. The bribe allegedly was given in return for petitioner's agreement to reduce that defendant's prison sentence and to revoke an order forfeiting certain property of that defendant. Petitioner was charged in the indictment with conspiracy to solicit and accept money in return for unlawful influence in the performance of lawful government functions, in violation of 18 U.S.C. 371 (Count I), and with corruptly obstructing the due administration of justice, in violation of 18 U.S.C. 2 and 1503 (Count II).[1]

Petitioner moved to quash the indictment on the ground that the court lacked jurisdiction over the criminal prosecution of an active federal judge who had not been removed from office by impeachment. After the trial judge denied the motion (Pet. App. 15a-19a), petitioner filed an interlocutory appeal and an application for writs of mandamus and prohibition. The court of appeals found that it did have jurisdiction to hear the interlocutory appeal and accordingly denied the application for the writs; on the merits of the appeal, the court affirmed the district court's denial of the motion to quash the indictment (Pet. App. 1a-11a).

ARGUMENT

Petitioner contends (Pet. 7-9) that the indictment against him should have been quashed, because the Constitution vests in Congress the exclusive jurisdiction, through the

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[1]Counts III and IV were limited to charges against Borders. The two cases were severed for trial. Borders was convicted after a jury trial in the United States District Court for the Northern District of Georgia, where his case had been transferred on his motion for a change of venue (see Pet. App. 3a n.3).

impeachment process, to bring to trial and punish a sitting federal judge. He also contends (Pet. 10-27) that the principles of separation of powers and judicial independence would be violated by allowing the Executive Branch to prosecute an active federal judge for acts committed in his official capacity. Preliminarily, we note that petitioner's request for a stay of his trial pending action on the instant petition was denied by this Court, and jury selection began on January 13, 1983. Even if the issue otherwise merited review, this procedural posture renders review inappropriate at this juncture in the case. In any event, petitioner's arguments were correctly rejected by the courts below, and review by this Court is unwarranted.

1. The Constitution does not bar the criminal prosecution of an active federal judge. The tenure of federal judges is set forth in Article III, Section 1: "The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior." The Constitution provides for impeachment in Article II, Section 4:

> The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

Clearly, neither provision confers on a judge any immunity from prosecution. The only constitutional provision discussing any relationship at all between impeachment and the criminal process is Article I, Section 3:

> Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy an Office of honor, Trust, or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.

As the language of this provision makes clear, and as the court of appeals found (Pet. App. 7a-8a), the purpose of this latter clause was not to confer upon judges or other impeachable officers any immunity from prosecution prior to impeachment; rather, it was to ensure that the Double Jeopardy Clause could not be invoked as a bar to criminal proceedings should removal from office by impeachment precede a prosecution.

The only other court of appeals that has addressed the question of the constitutionality of prosecuting a federal judge has agreed that there is no constitutional bar. *United States* v. *Isaacs*, 493 F.2d 1124, 1140-1144 (7th Cir.), cert. denied, 417 U.S. 976 (1974).[2] In fact, the first Congress, many of whose members had been delegates to the Constitutional Convention, enacted a statute that appears to recognize that sitting federal judges could be prosecuted for bribery. Section 21 of the Act of Apr. 30, 1790, ch. 9, 1 Stat. 117; see *United States* v. *Isaacs*, *supra*, 493 F.2d at 1142. Thus, there is no basis for arguing that the text of the Constitution confers any immunity from prosecution on a federal judge.[3]

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[2]There have been three other instances of criminal proceedings brought against active federal judges. See Pet. App. 6a n.7. Judge Francis Winslow of the Southern District of New York was indicted in 1929 and resigned before trial. Judge John Warren Davis of the Third Circuit was indicted and stood trial twice before resigning in 1941. Neither claimed immunity from criminal prosecution on the ground that they had not been impeached. Judge Otto Kerner of the Seventh Circuit, who was indicted, tried, and convicted for crimes he committed before he became a judge, unsuccessfully raised the immunity issue on direct appeal from his conviction. *United States* v. *Isaacs*, *supra*. Although Judge Kerner was prosecuted for criminal acts that occurred before he joined the bench, the court made clear that that fact was irrelevant to its decision. See 493 F.2d at 1142. See also *United States* v. *Manton*, 107 F.2d 834 (2d Cir. 1938), cert. denied, 309 U.S. 664 (1940) (rejecting claim that judge, who had resigned, was immune from prosecution for his judicial acts).

[3]Indeed, even the limited immunity from arrest that Article I, Section 6, confers on members of Congress is not extended to judges.

There is no merit to petitioner's argument (Pet. 9) that conviction of a crime is equivalent to a finding that the judge has committed an impeachable offense and therefore that the Executive's power to prosecute involved here conflicts with Congress' exclusive power to impeach. Criminal prosecution cannot be equated with the impeachment process. A conviction does not remove a judge from office, and the Executive claims no power to remove petitioner from office. Whether a criminal conviction ultimately leads to removal by impeachment rests with the sound discretion of Congress. See A. Simpson, *A Treatise on Federal Impeachments* 52 (1916). Thus, even the most vigorous advocates of the view that impeachment is the sole constitutional method of removing a federal judge from office have agreed that judges are subject to criminal prosecution. See *Chandler* v. *Judicial Council,* 398 U.S. 74, 141-142 (1970) (Black, J., dissenting).

Moreover, this Court has flatly rejected the analogous argument that criminal prosecution of a Senator is unconstitutional because it allows the Executive and/or Judicial Branch to remove him during his constitutionally prescribed term. The Court explained in *Burton* v. *United States,* 202 U.S. 344, 369 (1906): "[T]he final judgment of conviction [does] not operate, *ipso facto,* to vacate the seat of the convicted Senator, nor compel the Senate to expel him or to regard him as expelled by force alone of the judgment." See also *O'Shea* v. *Littleton,* 414 U.S. 488, 503 (1974); *United States* v. *Brewster,* 408 U.S. 501 (1972). In light of the power to prosecute and possibly imprison duly elected Congressmen, whose terms, unlike those of judges, are not limited by a "good behavior" proviso, it seems clear that the Constitution does not bar prosecution of a sitting federal judge.

2. Petitioner also relies (Pet. 8-9, 16-19) on the Judicial Councils Reform and Judicial Conduct and Disability Act

of 1980, 28 U.S.C. (Supp. V) 372, arguing that the Act embodies the judgment of Congress that the Executive Branch lacks the power to prosecute a sitting federal judge. But nothing in the Act itself addresses criminal prosecution of judges or suggests that criminal prosecution was intended to be proscribed. The language quoted by petitioner (Pet. 9; 28 U.S.C. (Supp. V) 372(c)(6)(B)(vii)(I)) does nothing more than reiterate that Congress retains its exclusive power of impeachment and removal from office.

Even a cursory reading of the relevant legislative history of the Act reveals that Congress understood that the power of the Executive Branch, through the Justice Department, to prosecute federal judges for violations of federal criminal laws is independent of the impeachment process. For example, the Honorable Elmo B. Hunter, United States District Judge for the Western District of Missouri, testified at hearings on the Act:

> First, I would like to turn to a consideration of the kind of conduct involved in our problem. We need not discuss criminal conduct as such. Federal and State criminal statutes apply to every Federal judge just as they apply to any other citizen.
>
> The U.S. attorneys and the State and local prosecutors have ample authority today to deal with that kind of misconduct. To those who have suggested that those prosecutors shy away from using their authority against a Federal judge, I have answered, and I say today, simply remove that prosecutor from office for failure to carry out his duty.

Judicial Tenure and Discipline - 1979-80: Hearings Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary, 96th Cong., 1st & 2d Sess. 55 (1979-1980) (hereinafter "*Hearings*"). The House Report expressly recognized the power to prosecute:

> Indisputably, the question of the best means by which to deal with allegations of unfitness against federal judges is one that concerns all three branches of the federal government. * * * [T]he Executive Branch, through the Department of Justice, also has a role in the appointment process, investigates allegations of criminal misconduct against judicial officers and prosecutes such judicial misbehavior * * *. Because of the separation of powers principle established by the Constitution, these roles must remain separate.

H.R. Rep. No. 96-1313, 96th Cong., 2d Sess. 5 (1980).[4] The fact that the Judicial Conduct and Disability Act preserves and recognizes the Executive Branch's independent power to prosecute a sitting federal judge is made clear by Subcommittee Chairman Kastenmeier's statement during the hearings on the Act:

> I think it is a truism, no matter what we do here legislatively, that there will be residually the power of Congress to impeach members of the Federal judiciary, and there will be power in the executive branch to prosecute the Federal judiciary for criminal wrongdoing. Whatever course we choose, those powers will not really in the final analysis be affected or diminished.

Hearings, supra, at 177. In sum, to the extent it is relevant here at all, the Judicial Conduct and Disability Act confirms that there is no legislative or constitutional bar to petitioner's prosecution.

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[4]See also 126 Cong. Rec. H8785 (daily ed. Sept. 15, 1980) (remarks of Rep. Kastenmeier); 126 Cong. Rec. S13860 (daily ed. Sept. 30, 1980) (remarks of Sen. De Concini) ("Nothing in the legislation precludes a complainant from bringing any matter to the attention of the House of Representatives for an impeachment inquiry or to the U.S. Department of Justice for a criminal investigation").

3. Petitioner contends (Pet. 10-16, 19-24) that the power to prosecute a sitting judge creates the possibility of abuse of that power that would threaten the independence of the judiciary.[5] The court of appeals correctly rejected this argument (Pet. App. 8a-11a). The court noted that "the independence of the judiciary from external pressures is a highly valued element of our constitutional system" (*id.* at 8a), but observed that that independence is adequately protected by specific constitutional provisions and, in this particular context, also by the protection shared by all citizens from vindictive prosecution (*id.* at 8a-9a).[6] Indeed, as the court stated in *United States* v. *Isaacs, supra,* the independence of the judiciary may actually be better served when criminal charges against its members are tried in a court rather than in Congress. The impeachment process has proven historically to be "cumbersome and fraught with political overtones" (493 F.2d at 1144). In a court trial, on the other hand, "a judge is assured of the protections given to all those charged with criminal conduct. The issues are heard in a calm and reasoned manner and are subject to the rules of evidence, the presumption of innocence, and other safeguards." *Ibid.* See also *United States* v. *Brewster, supra,* 408 U.S. at 519-520.

In other contexts, this Court has made it clear that the doctrine of separation of powers does not operate to insulate one branch from the legitimate exercise of power by

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[5]Although petitioner suggests (Pet. 12-13) that the Executive Branch chose to prosecute him because his views and decisions were unfavorable to the government, the district court noted that "the record is totally devoid of any evidence whatsoever to support an allegation that the government's motivation in bringing these * * * charges was vindictive or retaliatory" (Pet. App. 18a).

[6]Of course, a prosecutor cannot indict a judge on his own, but rather must adduce evidence sufficient to persuade a grand jury to indict. See *United States* v. *Brewster, supra,* 408 U.S. at 522 n.16.

another. Thus, in *United States* v. *Nixon*, 418 U.S. 683, 707 (1974), the Court stated: "In designing the structure of our government and dividing and allocating the sovereign power among the co-equal branches, the Framers of the Constitution sought to provide a comprehensive system, but the separate powers were not intended to operate with absolute independence." In the context of a criminal prosecution — in the particular case of a sitting legislator, not a judge — the Court emphatically rejected the claim that the power to prosecute for bribery endangered the independence of the legislative branch, which is additionally protected by a specific constitutional provision, the Speech or Debate Clause, Article I, Section 6, that does not apply to judges. The Court explained (*United States* v. *Brewster*, *supra*, 408 U.S. at 522, 524-525 (footnotes omitted)):

> [T]he Executive is not alone in possessing power potentially subject to abuse; such possibilities are inherent in a system of government that delegates to each of the three branches separate and independent powers.
>
> * * * * *
>
> We do not discount entirely the possibility that an abuse might occur, but this possibility, which we consider remote, must be balanced against the potential danger flowing from either the absence of a bribery statute applicable to Members of Congress or a holding that the statute violates the Constitution. As we noted at the outset, the purpose of the Speech or Debate Clause is to protect the individual legislator, not simply for his own sake, but to preserve the independence and thereby the integrity of the legislative process. But financial abuses by way of bribes, perhaps even more than Executive power, would gravely undermine legislative integrity and defeat the right of

the public to honest representation. Depriving the Executive of the power to investigate and prosecute and the Judiciary of the power to punish bribery of Members of Congress is unlikely to enhance legislative independence.

See also *Burton* v. *United States, supra,* 202 U.S. at 367-369. By the same token, the integrity of the judicial system would be threatened far more by insulating a sitting federal judge from prosecution for conspiring to solicit bribes and obstructing justice than it is by the limited infringement on separation of powers involved in allowing the Executive to retain the power to institute such a prosecution.[7]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[7]Petitioner also claims (Pet. 24-25) that no judge is qualified to preside over his trial because any judge would necessarily have an interest in the case. He thus argues that allowing this case to proceed conflicts with both 28 U.S.C. (& Supp. V) 455, concerning the disqualification of judges whose impartiality might be questioned, and *United States* v. *Will,* 449 U.S. 200 (1980). There is no merit in this argument, as the court of appeals held (Pet. App. 11a n.20). First, in *Will,* each Justice had a direct financial interest in the outcome that is absent here, where the interest of a judge in the outcome is quite speculative. In any event, the Court in *Will* held that, despite the Justices' interest in the outcome, the Rule of Necessity required the Court to decide the case (449 U.S. at 210-217), and the same principle would apply here.

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